(22,237)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 86.

JOHN E. SCOTT, PLAINTIFF IN ERROR,

vs.

CHARLES P. LATTIG, DESIGNATED AS C. P. LATTIG, AND ROBERT GREEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1912.

a THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Idaho, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Charles P. Lattig, design-ed as C. P. Lattig, plaintiff and respondent, and John E. Scott, defendant and appellant, and Robert Green, defendant and respondent, wherein was draw in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said John E. Scott, as by his complaint appears. We being
b willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of May, in the year of our Lord one thousand nine hundred and ten.

Done in the City of Boise, County of Ada, with the seal of the Circuit Court of the United States for the District of Idaho, attached.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
Clerk of the Circuit Court of the United States, District of Idaho.

Allowed by—
ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

[Endorsed:] In the Supreme Court of the State of Idaho. John E. Scott, Plaintiff in Error, vs. C. P. Lattig and Robert Green, Defendants in Error. Writ of Error. Filed May 6, 1910. I. W. Hart, Clerk Supreme Court of Idaho. Richards & Haga, Attorneys for John E. Scott, Plaintiff in Error. Office: First Nationla Bank Building, Boise, Idaho.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceeding in the within entitled case with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said supreme court, at Boise, Idaho, this 16th day of June, 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

Costs of Suit.

Plaintiff's costs, $25.85, paid by John E. Scott.
Defendant's costs, $2.00, paid by C. P. Lattig and Robert Green.
Costs of transcript, $41.55, paid by John E. Scott.

I. W. HART,
Clerk of the Supreme Court of Idaho.

Copy.

In the Supreme Court of the State of Idaho, October Term, 1909.

No. 1572.

C. P. LATTIG, Plaintiff and Respondent,
vs.
JOHN E. SCOTT, Defendant and Appellant; and ROBERT GREEN, Defendant and Respondent.

Transcript.

Appeal from District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County.

Ira W. Kenward, Attorney for Respondent C. P. Lattig.
Karl Paine, Attorney for Respondent Robert Green.
Richards & Haga, Attorneys for Appellant.

Filed July 17, 1909.
I. W. HART, *Clerk.*

3 In the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Canyon, State of Idaho.

C. P. LATTIG, Plaintiff,

vs.

J. E. SCOTT, BURT JAKOAKS, GEO. T. THEBO, JOHN TALBOT, CHAS. CRAVIN, ROBERT GREEN, and S. L. SPARKS, Defendants.

Amended Complaint.

Comes now the plaintiff and complaining of the defendants allege as follows:

First.

That on the 2d day of July, 1904, the plaintiff was and ever since has been the owner of and entitled to the possession of the following described real estate, situated in Canyon County, State of Idaho, to-wit:

Lots 1, 2, 3 & 4, Section 15 Township 9 north, Range 5 West, Boise Meridian; also that tract of land known as "Pool Island" lying along the east side of Snake River, beginning about 40 rods west and 40 rods south of the northeast corner of said Section 15 and from thence extending up said river for a distance of about 1 & ¾ miles containing about 300 acres and being in Sec-
4 tions 15 & 22, Township 9 north, Range 5 west, B. M. and in said sections extended toward said river.

Second.

That for the last 20 years immediately preceding the beginning of this action and continuously during said 20 years, the plaintiff and his grantors, have claimed title to, have claimed and occupied, have been in possession of, and controlled, and managed, cultivated and improved the above land and during all of said 20 years continuously the plaintiff and his grantors have paid all the taxes, State, county, municipal or school which have been levied and assessed upon the above described lands, according to law.

Third.

That the defendants, and each of them are setting up and claiming to have an interest or estate in and to the above described lands adverse to plaintiff's rights, title and interest in and to the same.

That said defendants have no right, title, estate or interest in and to said premises or any part of the same.

Wherefore plaintiff prays that his title in and to the above described lands be quieted, and he be decreed to be the owner of the same in fee simple, and also that he be entitled to the possession of the same with the right of possession.

That the defendants and each of them be enjoined from setting

up or asserting or claiming any right, title or interest in and to the property above described.

That the plaintiff have such other and further relief as the court may deem just and right and that he recover his costs herein.

IRA W. KENWARD,
Attorney for Plaintiff.

(Duly verified.)
Filed April 10th, 1905.

Answer of John E. Scott to Amended Complaint.

(Title of Court and Cause.)

Comes now the above named defendant, John E. Scott, and by way of answer to the amended complaint on file herein, admits, denies and alleges:

First.

Denies that on the 2nd day of July, 1904, or at any other time, or at all, plaintiff was or has been the owner or entitled to the possession of the tract of land known as Pool Island and described in said complaint.

Second.

As to whether or not the said plaintiff on the 2nd day of July, 1904, was or ever since has been the owner or entitled to the possession of lots 1, 2, 3, and 4, or any of said lots, or any part thereof, of Section 15, Twp. 9 N., Range 5 W., B. M., this defendant has no information or belief upon the subject sufficient to enable him to answer said allegations of the complaint, and therefore and by reason thereof denies the same.

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Third.

As to whether or not the said plaintiff and his grantors have for twenty years immediately preceding the beginning of said action and continuously during said twenty years, claimed title to, or occupied, or been in possession of, or controlled, or managed, or cultivated, or improved any part of the said lots or other lands described in said complaint, or paid all or any of the State, county, municipal or school taxes levied or assessed against said lands or any of them, this defendant has no information or belief upon the subject sufficient to enable him to answer the said allegation above set forth and contained in the second paragraph of said complaint, and therefore and by reason thereof denies the same.

Fourth.

Denies that said plaintiff or his grantors or predecessors in interest, or any of them, have occupied or been in possession of, or controlled, or managed, or cultivated, or improved the tract of land

described in said complaint and designated as Pool Island and situated in Snake River, for twenty years immediately preceding the commencement of this action, or at all, or have paid during any of said time, or at any time, all or any of the State, county, municipal or school taxes, which have been levied or assessed against said island, according to the law or otherwise; denies that any taxes have ever been assessed or levied against said island or any person by reason of occupancy or alleged ownership of said island. But this defenant alleges the fact to be that the said tract of land known as Pool Island is part of the unsurveyed public domain of
7 the United States now occupied, held and claimed by this defendant by reason of prior possession, actual occupancy and residence; and the said island has at no time been subject to taxation for either State, county, municipal or school purposes.

Fifth.

This defendant denies that he now claims or ever has claimed any interest whatsoever in or to said lots 1, 2, 3 and 4, or any of them, or any part of any of them. But this defendant alleges the fact to be that he claims an interest in the tract of land known as Pool Island situated in Snake River and entirely separated from said lots by the east channel of Snake River, which flows between said island and the said lots; and this defendant further alleges that the said Pool Island contains approximately one hundred and sixty (160) acres of land, all of which is unsurveyed and constitutes part of the unsurveyed public domain of the United States, and is now claimed and held and occupied by this defendant and his family, under the provisions of Chapter 4, Title 10, of the Code of Civil Procedure of the Revised Statutes of the State of Idaho, of 1887, and under the public land laws of the United States; and that it is the intention of this defendant to enter, file upon and claim the said tract known as Pool Island, as a homestead under the public land laws of the United States, as soon as the same is surveyed and subject to entry; and the said island is now and for about two years last past has been occupied and cultivated by this defendant; and denies that said plaintiff has any right, title or interest whatsoever thereto, or in or to any part thereof; and denies that this defendant
8 has no right, title, estate or interest in and to the said tract known as Pool Island.

Wherefore this defendant, having fully answered the complaint herein, prays that he be dismissed hence without day and for his costs in this behalf expended.

RICHARDS & HAGA,
Attorneys for Defendant John E. Scott,
Residing at Boise, Idaho.

(Duly verified.)
Filed September 27, 1905.

Answer to Amended Complaint; and Cross Complaint of Robert Green.

(Title of Court and Cause.)

Comes now the defendant, Robert Green, and, leave having been first obtained therefor, files this his answer to plaintiff's amended complaint, and admits, denies, and avers as follows:

First.

Defendant admits that on the 2nd day of July, 1904, the plaintiff was, and ever since has been the owner of, and entitled to the possession of, Lots 1, 2, 3, and 4, Section 15, Township 9 North, Range 5 West, Boise Meridian; but defendant denies that plaintiff then was, or at any time since has been the owner of, or entitled to the possession of that certain tract of land known as Pool Island, alleged in said complaint to be lying along the east side of Snake River, or any portion of said tract of land, except that portion thereof lying and being in said Section 15, Township 9 North, Range 5 West, as aforesaid.

Second.

Defendant denies that for the last twenty years, or for any other time, immediately preceding the beginning of this action, or continuously, or at all, during the said twenty years, the plaintiff or his grantors have claimed title to, or occupied, or have been in the possession of, or control, or managed, cultivated or improved any portion of the land described by plaintiff as Pool Island, in Section 22, Township 9 North, Range 5 West, Boise Meridian; and denies that said plaintiff or his grantors have paid all, or any of the taxes, either State, county, municipal or school, which have been levied or assessed upon the said land described as Pool Island in said Section 22, according to law, or otherwise.

Third.

Defendant admits that he claims an interest and estate in and to that portion of the land described in plaintiff's complaint as Pool Island, or that portion thereof being, lying and situate in the fractional north half of said Section 22.

And for further and separate answer to said amended complaint, this defendant avers that he now is, and for more than twenty years last passed he and his grantors have been the owners of in the possession of all of the fractional north half of Section No. 22, Township 9 North, Range 5 West of the Boise Meridian; that about seventy-five acres, more or less of the land described by plaintiff as Pool Island, is situate in and a part of the said fractional north half of said Section 22, and owned, occupied and possessed during all of the last mentioned time by defendant as afore-

said; and that the defendant is now the owner thereof, in the possession thereof, and entitled to the possession thereof.

Cross-Complaint.

And for cross-complaint and cause of action, the defendant Robert Green alleges as follows: That he, the said Robert Green, now is and for more than twenty years last passed he and his grantors have been the owners of, in the possession of, and entitled to the possession of all of the fractional north half of Section 22, in Township 9 North, Range 5 West, Boise Meridian, in Ada County, Idaho, that the said plaintiff C. P. Lattig, and the defendants J. E. Scott, Bert Jokoaks, George T. Thebo, John Talbot and Charles Craven, and each of them, are setting up and claiming an interest in and to a portion of the above described property adverse to this defendant, the cross-complainant's rights, title and interest in and to the same; that the particular portion of said above described land claimed by said plaintiff and said defendants, and to, and in which they are setting up and claiming to have an interest and estate, is that portion of what is commonly called and known as Pool Island, situated in the said north half of the aforesaid fractional section 22, the same being a part of the above described land of this cross-complaint; that neither the said plaintiff nor any of the above named de-
11 fendants have any right, title or interest, or estate in and to the said premises, or any part of the same.

Wherefore this defendant prays that plaintiff take nothing by his complaint herein, and that defendant's title in and to the above described land be quieted, that he be decreed to be the owner of the same in fee simple, and also that he be decreed entitled to the possession of said land, and that said plaintiff and each of the above named defendants be enjoined from setting up or asserting, or claiming any right, title or interest in and to the property above described.

FREMONT WOOD,
Attorney for Defendant, Robert Green.

Office Rooms 14-15 Pioneer Building, Boise, Idaho.

(Duly verified.)
Filed Dec. 11, 1905.

Answer of Plaintiff to Cross-Complaint of Robert Green.

(Title of Court and Cause.)

Comes now the plaintiff and answering the cross-complaint of Defendant Robert Green, alleges as follows:

That the plaintiff has no information or belief sufficient to enable him to answer the first portion of said complaint and therefore denies that said defendant and his grantors or either of them for the last twenty years or at any time has been or now is in posses-
12 sion of, entitled to the possession of or the owner of all of fractional north half of Sec. 22, Tp. 9 N., R. 5 W. B. M. or any part or parcel thereof.

Admits that he is claiming and setting up title to and an interest in and claiming the right of possession of all that land commonly known as Poole island. Denies that this plaintiff has no right, title or interest, or estate in and to said island or any part of the same but alleges that he is the owner of and entitled to the possession of said island and every part and parcel thereof, and claims no interest in or to any other portion of the land attempted to be described by said defendant.

Wherefore the plaintiff prays that this defendant take nothing by or under his said cross-complaint and that the plaintiff recover the possession of with the right of possession of, and be adjudged the owner of in fee simple of said Poole island and each and every portion thereof and that he recover his cost herein, and have such other and further relief as the portion may deem right.

IRA W. KENWARD,
Attorney for Plaintiff.

(Duly verified.)
Filed Dec. 15, 1905.

Answer of J. E. Scott to Cross-Complaint of Robert Green.

(Title of Court and Cause.)

Comes now the above named defendant J. E. Scott and by way of answer to the cross-complaint of the defendant Robert Green, admits, denies and alleges:

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I.

Admits that this defendant is setting up and claiming an interest in and to that certain island known as Pool Island and referred to in said cross-complaint and to the whole of said island; but denies that said island or any part thereof constitutes or forms a part of the fractional North ½ of Sec. 22, Twp. 9 N., Range 5 W., B. M., or of any other lands owned by the said Robert Green.

II.

Denies that the said Pool Island or any part thereof forms a part of any lands owned by said Robert Green.

III.

Denies that this plaintiff has no right, title, interest or estate in said Pool Island, but this defendant alleges the fact to be that he claims an interest in said Pool Island and the whole thereof, and that the said Pool Island is situated in Snake River and entirely separated from the main line and the lots and tracts described in said complaint, by the east channel of Snake River, which flows between said island and the said tracts of land alleged to be owned by said cross complainant.

VI.

This defendant further alleges that the said Pool Island contains approximately one hundred and sixty acres of land, all of which is unsurveyed and constitutes part of the unsurveyed public domain of the United States, and is now claimed and held and occupied
14 by this defendant and his family under the provisions of Chapter 4, Title 10, of the Code of Civil Procedure of the Revised Statutes of the State of Idaho, 1887, and under the Public Land Laws of the United States, and that it is the intention of this defendant to enter, file upon and claim the said tract known as Pool Island and the whole thereof, as a homestead under the Public Land Laws of the United States as soon as the same is surveyed and subject to entry; that the said island and for about two years last past has been occupied and cultivated by this defendant; and this defendant denies that said cross complainant has any right, title or interest whatsoever thereto or in or to any part thereof.

Wherefore, this defendant, having fully *an*answered said cross complaint, prays that he be dismissed hence without day and for his costs in this behalf expended.

RICHARDS & HAGA,
Attorney for Defendant J. E. Scott,
Residing at Boise, Idaho.

(Duly verified.)
Filed Dec. 22, 1905.

Supplemental Answer of J. E. Scott.

(Title of Court and Cause.)

Now comes the defendant John E. Scott, by his attorneys Richards & Haga, by leave of Court first had and obtained, and files this his supplemental answer, and avers and shows that heretofore, to-wit: on the 16th, 18th and 19th days of Jnue, 1906, and since the filing of the answer of this defendant heretofore filed in this cause,
15 the Government of the United States, through its Land Department and at the request of the Commissioner of the General Land Office, caused the said island described in the answer heretofore filed by this defendant, to be surveyed under the laws of the United States and under the rules and regulations of the Department of the Interior pertaining to the surveying of public lands, which said survey was duly approved and certified to by the Surveyor General of the United States for the State of Idaho on the 18th day of October, 1906, and which said survey was accepted by the Commissioner of the General Land Office on or about the 15th day of December, 1906, and the plat of such survey was by the said Commissioner sent to the United States Land Office at Boise City, Idaho, to be filed in such office after notice given as is required by law and the rules of the Land Department for the filing of plats and authorizing the entry of public lands; and the Register and Receiver of the United States Land Office for Boise, Idaho, on the 20th day of May, 1907, did issue, post and publish the notice required by law and the rules of such Department, wherein it was stated that the said

plat of the survey of said island would be filed in said Land Office at Boise, Idaho, at nine o'clock A. M. on the 8th day of July, 1907; that immediately upon the filing of said plat, the said land so embraced in said survey and in said Pool Island will be subject to entry under the public land laws of the United States, and this defendant as an occupant of said island and having been in possession thereof for several years last past, is and will be entitled to a preference right of entry and will have the first and prior right to enter said land, and it is the intention and desire of this defendant to so enter
16 the said land as a homestead under the homestead land laws of the United States, and this defendant has occupied, claimed and held possession of the said island for several years last past for the purpose of claiming the same and obtaining title thereto as soon as the same could be made; that the said land embraced in said island is now and always has been part of the public domain of the United States, and as shown by the plat and the survey made of said island and now on file in the office of the United States Surveyor General and in the General Land Office of the United States, consists of Lots numbered 5, 6 and 7 of Section 15, and Lots numbered 5 and 6 of Section 22, Township 9 North, Range 5 West, B. M., and aggregates 138.15 acres.

That no protest or objection of any kind was made by the said plaintiff nor by the said cross-complainant Robert Green against the making of said survey or against the application of this defendant for a survey of said island, and that due notice of this defendant's application for a survey of the said island was duly and regularly served on the said plaintiff and the said cross-complainant, and they, and each of them, were by said notice advised, notified and requested to within thirty days from service of such notice, file with the United States Surveyor General for the State of Idaho, their objections, if any they had, to the survey of said island or to the application of this defendant for a survey thereof; but neither the said plaintiff nor the said cross-complainant made any protest or objection whatsoever thereto, but they, and each of them, wholly ignored the said notice and request for protest or objection to such
17 survey, if any objection they had thereto, and they and each of them wholly ignored said application and the rules and regulations of the Department of the Interior in relation thereto; and thereupon and thereafter the United States of America, through its Land Department, caused the said island to be surveyed and a plat thereof to be made as hereinbefore stated, all of which was done at the expense of the Government of the United States.

Wherefore, This defendant prays that this action be dismissed and that the said plaintiff take nothing by his complaint herein, and that the defendant Robert Greene take nothing by his cross-complaint herein, and that they, and each of them, be barred by their laches and failure to object to such survey, from claiming any title to said island or any part thereof.

RICHARDS & HAGA,
Attorneys for Defendant John E. Scott,
Residence, Boise, Idaho.

(Duly verified.)
Filed June 6, 1907.

Answer of Plaintiff to Supplemental Answer of John E. Scott.

(Title of Court and Cause.)

Comes now the plaintiff and in answer to defendant, J. E. Scott's, supplementary answer alleges as follows:

First.

18 That he has no information or belief sufficient to enable him to answer said supplementary answer and therefore denies:

That the United States Government at any time or at all, other than at the time of making the original survey of Township 9 North, Range 5 West B. M., surveyed or caused to be surveyed said land known as Pool Island and the property in dispute in this action, that any survey other than said original survey has been approved or certified to by the Surveyor General of the U. S. at any time or at all or that the same has been accepted at any time by the Commissioner of the General Land Office and that the plat has been sent to the Land office at Boise, Idaho, to be filed or at all; denies that the officers of the Land Office at Boise, Idaho, have issue-, post- or publish- notice as set out in said answer or at all, denies that on the filing of said plat or at all said land known as Pool Island and in dispute herein will be subject to entry and denies that the defendant J. E. Scott as an occupant or otherwise, of said land will have or be entitled to preferred right thereto or a prior right thereto and denies that it is the intention of said defendant to enter said land as a homestead or at all.

And further denies that defendant J. E. Scott has held said land for several years last past or any other greater time than that set out in plaintiff's complaint, or that he has held the same *with* for the purpose of claiming title thereto or by claiming title thereto or at all other than a naked trespasser.

Denies that said land in dispute is now or was at the time of bringing this action unsurveyed public lands of the U. S. or any part thereof, denies that plaintiff was at any time or at all served
19 with notice of said application for said survey or had notice of the same, or of said survey.

Admits that he made no protest, but made none for the reason that he was not notified of the same or was served with the notice as set out in said answer, or at all.

And states the facts to be that this defendant J. E. Scott has no right, title or interest in and to said land herein in dispute, and that he now is and has been during all the time he has been thereon a naked trespasser thereon, on and after the 1st day of March, 1904, and that he has been duly notified to surrender possession thereof to the plaintiff, and that all rights, preferred or otherwise was at the time of the beginning of this action and now are vested in the plaintiff who was and now is the owner thereof.

IRA W. KENWARD,
Attorney for Plaintiff, Residing at Payette, Idaho.

(Duly verified.)
Filed June 7, 1907.

Findings of Fact and Conclusions of Law.

(Title of Court and Cause.)

This cause came on regularly for trial on the 9th day of July, 1907, before the court without a jury, a jury trial having been duly waived by the parties, at chambers, in the City of Payette, Idaho, by stipulation of counsel, I. W. Kenward, Esq., appearing as attorney for plaintiff, Richards & Haga, Esqs., for defendant
20 J. E. Scott, and Karl Paine, Esq., for the defendant Robert Green, the defendants Bert Jakoaks, George T. Thebo, John Talbot, Charles Cravin and S. L. Sparks not appearing by counsel or otherwise, and the court having heard all the evidence and proofs produced herein and duly considered the same, and being fully advised in the premises, and it appearing therefrom to the satisfaction of the court that the defendants, Bert Jakoaks, George T. Thebo, John Talbot, Charles Cravin and S. L. Sparks, were duly and regularly summoned to answer unto the plaintiff's complaint herein, and that each has made default in that behalf, and that the default of each for not appearing and answering unto plaintiff's complaint was duly and regularly entered herein, from the evidence introduced at the trial the court finds the facts as follows, to-wit:

I.

That on the 2d day of July, 1904, the plaintiff was and ever since has been, and his grantors were for many years prior thereto, the owners of and entitled to the possession of lots one, two, three and four of Section fifteen, township nine north, range five west, Boise meridian, situated in Canyon county, State of Idaho, and all of that portion of the island known as Pool Island which lies west of and opposite the meander line of said lots and between said meander line and the middle of the main channel of Snake River.

II.

That the defendant Robert Green now is, and for more than thirteen years last past has been, the owner of, in the possession
21 of, and entitled to the possession of all of the fractional north half of Section twenty-two in Township nine north, Range five west, Boise meridian, in Canyon county, Idaho, and of that portion of the island known as Pool Island which lies west of and opposite the meander line of said fractional north half, and between said meander line and the middle of the main channel of Snake River.

III.

That at the time of the commencement of this action, and for ten years and more prior thereto, the defendant S. L. Sparks was the owner, in the possession of, and entitled to the possession of the fractional south half of Section twenty-two, Township nine north, Range five west, Boise meridian, in Canyon county, Idaho,

excepting however that portion thereof which lies west of and opposite the meander line of said fractional south half and east of the middle of the main channel of Snake River, known as part of Pool Island, and as to that part of Pool Island the court finds:

That for the last 20 years immediately preceding the beginning of this action and continuously during said 20 years, the plaintiff and his grantors have claimed title to, have claimed and occupied, have been in possession of and controlled and managed, cultivated and improved the same land, and during all of said 20 years continuously the plaintiff and his grantors have paid all the taxes, State, county, municipal or school, which have been levied and assessed upon the above described lands, according to law; and that no taxes have been levied thereon during said time, and that plaintiff is the owner thereof.

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IV.

That at the point opposite the land and the whole thereof before described, Snake River is a navigable stream and the main channel thereof is west of said Pool island, and the center of said main channel forms the boundary line between the States of Oregon and Idaho, and said island lies east of the center of said main channel and within the State of Idaho.

V.

That on the 16th, 18th and 19th days of June, 1906, upon application of defendant J. E. Scott, the government of the United States, through its Land Department and at the request of the Commissioner of the General Land Office, caused the said Pool Island to be surveyed at its own expense, which survey was proved and certified to by the surveyor general of the United States for the State of Idaho, on the 18th day of October, 1906, and accepted by the Commissioner of the General Land Office on or about the 15th day of December, 1906, and the plat of such survey sent to the United States Land Office at Boise, Idaho, by said Commissioner, to be filed in such office after notice, as is required by law and the rules of the Land Department for the filing of plats and authorizing the entry of public lands. And the register and receiver of the United States Land Office for Boise, Idaho, on the 20th day of May, 1907, did issue, post and publish the notice required by law and the rules of such department, wherein it was stated that the said plat of the survey of said island would be filed in said land office at Boise, Idaho, at 9 o'clock A. M. on the 8th day of July, 1907; that

23 no protest or objection of any kind was made by the plaintiff or the defendant Robert Green against the making of said survey or against the application of this defendant for a survey of said island, and that due notice of Defendant Scott's application for a survey of the said island was duly and regularly served on the defendant Robert Green, but the same was not served upon the plaintiff; that the defendant Robert Green was by said notice advised, notified and requested to file with the United States surveyor

general for the State of Idaho, within thirty days from service thereof, his objections, if any he had, to the survey of said island, or to the application of Defendant Scott for a survey thereof, but Defendant Green wholly ignored the said notice, but informed the Defendant Scott that he was the owner of that part of Pool island which lies west and opposite to his said land; that the said land embraced in said island and as shown by the plat and the survey made of said island and now on file in the office of the United States surveyor general in the General Land Office of the United States, consists of Lots numbered five, six and seven of Section fifteen, and Lots numbered five and six of Section twenty-two, Township nine north, Range five west, Boise meridian, and contains 138.15 acres; that the said land embraced in said island is not now and has not been part of the public domain of the United States since the government parted with its title to the said lands of plaintiff, Defendant Scott and Defendant Sparks by its patents duly issued more than thirteen years ago; that the Defendant Scott has occupied and claimed said island for several years last past and prior to the commencement of this action; that he claimed
24 and held and occupied the same and cultivated a part thereof, under the provisions of Chapter 4, Title 10 of the Code of Civil Procedure of the Revised Statutes of Idaho of 1887, and with the intention to enter, file upon and claim the said island as a homestead under the public land laws of the United States as soon as the same was surveyed and subject to entry; that plaintiff and defendant Green were the owners and in the possession of said island at the time that defendant Scott went upon said island and occupied or claimed the same.

VI.

That for a long time prior to the commencement of this action the Defendant Scott was and still is claiming an interest in and to said island adverse to the plaintiff and the Defendant Green; that he has no right, title, estate or interest in or to said island or to any part thereof, and that plaintiff and Defendant Green are entitled to a decree quieting their title to said island and enjoining the Defendant Scott from setting up or asserting or claiming any right, title or interest therein.

Conclusions of Law.

As conclusions of law from the foregoing facts the court finds:

I.

That the plaintiff is, and for many years prior to the commencement of this action he and his grantors and predecessors in
25 interest were, the owners of and in the possession of and entitled to the possession of Lots one, two, three and four of Section fifteen, Township nine north, Range five west, Boise meridian, situated in Canyon county, State of Idaho, and of all that portion of the island known as Pool Island which lies west of and

opposite the meander line of said lots and between said meander line and the middle of the main channel of Snake River.

II.

That at the time of the commencement of this action, and for ten years or more prior thereto, the Defendant S. L. Sparks was the owner in the possession of and entitled to the possession of the fractional south half of Section twenty-two, Township nine north, Range five west, Boise meridian, in Canyon county, Idaho, excepting that portion thereof which lies west of and opposite the meander line of said fractional south half and east of the middle of the main channel of Snake River, known as part of Pool Island, and as to that part of Pool Island the court finds, that for the last twenty years immediately preceding the commencement of this action and continuously during said time the plaintiff and his grantors claimed title to and claimed and occupied and have been in possession of, and controlled, managed, cultivated and improved the same, and during all of said time the plaintiff and his grantors have continuously paid all taxes, State, county, municipal or school, which have been levied and assessed upon the said land according to law, and that no taxes have been levied thereon during said time, and that plaintiff is the owner thereof.

26

III.

That the Defendant Robert Green now is, and for more than thirteen years last past has been, the owner of, in the possession of and entitled to the possession of all of the fractional north half of Section twenty-two, in Townshin nine north, Range five west, Boise meridian, in Canyon county, Idaho, and of all that portion of the island known as Pool Island which lies west of and opposite the meander line of said fractional north half and between said meander line and the middle of the main channel of Snake River.

IV.

That the said land embraced in said island is not now and has not been part of the public domain of the United States at any time since the government parted with its title to the said lands of plaintiff, defendant Green and defendant Sparks, by its patents, which were duly issued by it to the plaintiff and said defendants, or their grantors and predecessors in interest, more than thirteen years ago and long prior to the time that defendant Scott went upon said island and occupied or claimed the same.

V.

That said island is situated to the east of the middle of the main channel of Snake River, within the State of Idaho, and that the thread of the main channel of Snake River forms the boundary line between the States of Idaho and Oregon, and that Snake River is a navigable stream at the point where it flows by said island.

27 VI.

That for a long time prior to the commencement of this action defendant Scott was and still is claiming an interest in and to said island adverse to the plaintiff and defendant Green; that he has no right, title, estate or interest in or to said island, or to any part thereof, and that plaintiff and defendant Green are entitled to a decree quieting their title to said island and enjoining the defendant from setting up or asserting or claiming any right, title or interest therein; that plaintiff and defendant Green are also entitled to judgment against defendant Scott for their costs of suit herein.

VII.

That neither the government nor the defendant Scott acquired any right, title or interest in or to said island, or any part thereof, by said survey, or otherwise, and neither can acquire any right thereto except by purchase thereof from the plaintiff and the defendant Green, the government of the United States having conveyed all its right, title and interest in said island to the defendants Sparks and Green and to the grantors of the plaintiff and being estopped thereby from claiming any interest in said island, or from selling or offering to sell the same to the defendant Scott, or any one else.

June 16, 1908.

ED. L. BRYAN,
District Judge.

Filed June 17, 1908.

28 *Decree.*

(Title of Court and Cause.)

This cause came on regularly for trial on the 9th day of July, 1907, at Chambers, in the City of Payette, Idaho, by stipulation of counsel, before the Court, without a jury, a jury trial having been duly waived by the parties; I. W. Kenward, Esq., appearing as attorney for plaintiff, Richards & Haga, Esqs., for defendant J. E. Scott, and Karl Paine, Esq., for the defendant Robert Green, upon the complaint filed therein and upon the answer and supplemental answer of the defendant Scott, and the answer and cross-complaint of defendant Green, the defendants, George T. Thebo, Bert Kakoak, John Talbot, S. L. Sparks, and Charles Cravin, not appearing by counsel or otherwise, they having been duly and regularly summoned to answer into the plaintiff's complaint herein, and each having made default in that behalf, and the default of each for not appearing and answering unto plaintiff's complaint being duly and regularly entered herein; whereupon witnesses were duly sworn and examined on the part of plaintiff and defendants Scott and Green, and documentary evidence introduced, and the evidence being closed the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and

decision in writing and orders that judgment be entered herein in favor of plaintiff and the defendant Robert Green in accordance therewith.

Wherefore, it is ordered, adjudged and decreed that the plaintiff and the defendant Robert Green have judgment against all the other defendants as follows:

That all adverse claims of the said other defendants, and all persons claiming or to claim the premises described in said complaint and cross-complaint, or any part thereof, or any interest therein, through or under said other defendants, are hereby adjudged and decreed to be invalid and groundless, and that plaintiff and defen-ant Robert Green be and they are hereby decreed and adjudged to be the true and lawful owners of the land and premises described in said complaint and cross-complaint and hereinafter described, and every part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims, demands or pretentions of said other defendants, who are hereby perpetually estopped from setting up any claim thereto, or to any part thereof, or interest therein; that the plaintiff is hereby adjudged and decreed to be the owner and entitled to the possession of that portion of said premises described as follows, to-wit: Lots one, two, three and four of Section fifteen, Township nine north, Range five west, Boise Meridian, situated in Canyon County, State of Idaho, together with all that portion of the island known as Pool Island, which lies west of and opposite the meander line of said lots and between said meander line and the middle of the main channel of Snake River; also all of that portion of said island situated west and opposite the meander line of the fractional south half of Section twenty-two, Township nine north, Range five west, Boise Meridian, Canyon county, Idaho, and between said meander line and the middle of the main channel of Snake River. That the defendant Robert Green is the owner and entitled to the possession of that part of said premises described as follows, to-wit: All of the fractional north half of Section twenty-two, in Township nine north, Range five west, Boise Meridian, situated in Canyon county, Idaho, together with all that portion of the said island which lies west of and opposite the meander line of said fractional north half of Section twenty-two and between said meander line and the middle of the main channel of Snake River.

And it is hereby further ordered, adjudged and decreed that the plaintiff and the defendant Robert Green do have and recover their costs, amounting to the sum of $— and $—, respectively, against the defendant J. E. Scott, but not against the other defendants, or any of them.

Judgment rendered this 16th day of June, 1908.

ED L. BRYAN,
District Judge.

(Filed and entered June 17th, 1908.)

Notice of Intention to Move for a New Trial.

(Title of Court and Cause.)

To the above named plaintiff and his attorney of record, Ira W. Kenward, and to the defendant Robert Green and his attorney of record, Karl Paine, and to David C. Chase, administrator for the estate of S. L. Sparks:

You, and each of you, will please take notice that the defendant John E. Scott intends to move the Court to vacate and set aside the decision, judgment and decree heretofore rendered and en-
31 tered herein and to grant a new trial of said cause, upon the following grounds, to-wit:

First. Accident or surprise which ordinary prudence could not have guarded against.

Second. Newly discovered evidence material to the defendant John E. Scott, which he could not with reasonable diligence have discovered and produced at the trial.

Third. Insufficiency of the evidence to justify the decision of the Court.

Fourth. That the decision of the Court is against law.

Fifth. Errors in law occurring at the trial and excepted to by the defendant John E. Scott.

Said motion will be made upon affidavits hereafter to be filed and served upon you, upon the records and files in the action, upon the minutes of the court, upon a bill of exceptions, and upon a statement of the case hereafter to be prepared; or said motion will be made upon any, either or all of said showings, i. e., affidavits to be filed and served, records and files in the action, minutes of the court, a bill of exceptions, and a statement of the case hereafter to be prepared.

RICHARDS & HAGA,
Attorneys for Defendant John E. Scott,
Residence, Boise, Idaho.

(Service acknowledged.)
Filed June 27, 1908.

32 *Statement on Motion for a New Trial.*

(Title of Court and Cause.)

This cause came regularly on for trial before the Court without a jury, on the 9th day July, 1907, Ira W. Kenward, Esq., appearing as counsel for the plaintiff, and Messrs. Richards & Haga appearing as counsel for the defendant J. E. Scott, and Karl Paine, Esq., appearing as counsel for the defendant Robert Green.

Whereupon plaintiff, to sustain the issues on his part, offered and introduced the following evidence:

THOMAS WALTZ called as a witness for plaintiff, after being duly sworn, testified as follows:

(Direct examination by Mr. KENWARD:)

"I was employed by plaintiff on the Poole ranch in the winter of 1904, I worked for Mr. Lattig from 1903 to 1905; the Poole ranch including the Poole Island was rented to a Mr. George Thebo; while it was so rented the defendant J. E. Scott appeared on the said Island, this was in January, 1904, he was feeding cattle for Mr. Thebo on the Island and was working under him, so Mr. Scott tolc me; he was living in a tent; up to the time this suit was started and at the time I left (in 1905) he was still living in a tent.

(Cross-examination by Mr. PAINE:)

The property on the Poole estate consisted of lands lying west of the O. S. L. railroad tract and Snake River and also included what is known as the "Poole Island." I went to work for Mr. Lattig in the spring of 1903 and worked for him up to August, 1905; I was not much acquainted with Mr. Scott during this time. The conversation we had with Mr. Thebo was on the main land of
33 the Poole estate, east of the slough, Thebo said that Scott was his tenant; in the other conversation Scott informed plaintiff that he was feeding cattle for Mr. Thebo.

(Cross-examination by Mr. HAGA:)

"I was on the island in 1904 two or three times. I do not know as Mr. Scott has a family. The first trip I made to the island, in the early winter of 1904, I got a load of wood. The time Mr. Lattig had the conversation with Mr. Scott we were on the island getting a load of wood, as I remember it. On Mr. Scott's first appearance on the island, he was living in a tent at the upper end of the island,—afterwards he moved down nearer the lower end, opposite the ford."

A. B. ANDERSON, called as a witness for plaintiff, after being duly sworn, testified as follows:

(Direct examination by Mr. KENWARD:)

"I reside at Weiser, Idaho. I am administrator of the Poole estate. Mr. Poole died the 12th of March, 1898, and I was administrator from March, 1898, to July, 1904, when I settled up the estate. As such I had control and management of the property which consisted of land and cattle and horses. The land was the island and the land adjoining it on the east; the Poole Island or Shell—Shell originally owned the island. I was in possession of that island as administrator, from 1898 to 1904 when I settled up. During all of that time I tried to manage it in the best manner possible. I paid all the taxes assessed against the estate. I could not say whether there was any taxes assessed against that island or not, I don't think that island was assessed, as a matter of fact, I know it

wasn't assessed. There never was any taxes against that
34 island to my knowledge. Samuel Poole was a brother-in-law of mine. I was there in the fall of 1883 and he was in possession of the island at that time; he was living on it and had a house on the island and run some cattle, grazing them, and he had his cattle on the island wintering. He broke some land up there, just what year I could not say, he said he was going to seed it and wanted to trade to me. He wanted me to go into partnership with him in the cattle business and was telling me how many acres there was in it. He continued in possession of the island from that time and claimed it as his own. He had some hay cut there at different times. He plowed the place at one time, I forget just what year. He claimed to me that his ownership and possession extended over the whole island. It was my understanding that as administrator I took possession of the whole island. As administrator I sold it to Mr. C. P. Lattig. The estate was wound up by order of the Court. I could not say for the island being sold under direction of the Court.

"I crossed Snake River on the 11th of June, 1869, and have been acquainted with it since that time. I have had opportunity to observe it under all conditions and times. I have lived right along the river. It varies in depth. It is a very rapid stream in places, but we frequently ford it in the fall of the year on horseback. In the spring it is a swift stream when the flood waters are on; the flood waters usually go down in August. September and October is the lowest season, I suppose. The spring floods cease all the way from June to August. It becomes low in the fall of the year so that it has been forded by men at different points. I have
35 been up and down Snake River about a hundred miles and along late in the fall the principal part of the water just runs in crevices or channels in the river; to look at it from the bank it don't look to be over ten to twenty feet across; logs stuck out of these riffles, and down at Bay Horse Rapids it is not navigable even by a skiff when the water gets low, down that canyon. I am acquainted with the river from Payette to the place I have just spoken of and have been over it more or less in the spring of the year. It frequently gets out of its banks, especially when big ice gorges form. The main channel is on the west side, the Oregon side, between the Shell or Poole Island and the Oregon side."

Mr. PAINE: "Do you claim there has been any taxes paid on this island?"

Mr. KENWARD: "It is my theory that there never has been any taxes paid on the island."

(Cross-examination by Mr. PAINE:)

"The Poole Island I suppose is 300 feet, I would not be sure, west of the main land on the Idaho side. The water in that channel is very low in the fall of the year, I have noticed little Sammy Poole, the boy, wading across there. I know at times it is not over a foot in depth, in the fall of the year. The island never overflows to my

knowledge. No, sir, it never has. Some of the lowest land may perhaps have, I don't know about that, but the main part of it has never been overflowed to my knowledge. I have never been on the island in high water, but I have been on the opposite bank where I could see the water. I could see it never overflowed. I have never known Robert Green or S. L. Sparks to occupy any part of
36 that island or to run live stock of any kind on the island.

(Cross-examination by Mr. HAGA:)

"Snake River commences to rise in February, March and April. It rises then until the middle of June, and the low stage is some time in October. The time the Poole boy waded across was in the latter part of September, in my opinion. I suppose he was ten or eleven then. It would not average a foot. There was places where it was a foot; there was places where it was shallow, and places where it was deep, but he was able to wade it. I have crossed these channels a number of times. I crossed a horse-back in the fall and winter months. I never tried to wade it. I never measured it in high water. The usual mode of crossing is by boat or horse-back. They had boats for that purpose. I never saw the island overflow. When I was administrator of the Poole estate, I listed the property with the assessor that was subject to taxation."

Q. "Why didn't you list this island?"

A. "My understanding was that was unsurveyed, it was just claimed as abutting property and that he bought these improvements, Shell's rights in it."

Q. "You understood it was unsurveyed land and not subject to taxation?"

A. "Yes, sir, it was claimed by Poole."

Q. "That he held it simply by having possession of it?"

A. "Yes, sir."

Q. "Sort of a squatter's right to it?"

A. "You might call it that."

Q. "During all of the years from 1898 to 1904 that you
37 were administrator of the estate, you paid no taxes and didn't turn this in as taxable property?"

A. "It was never mentioned in the assessment. The only thing I can remember as to the number of acres in the island was when he wanted me to go in with him in the cattle business, he claimed there was 250 acres in the island. That is what I estimated or assumed there was when I had charge of it. I didn't sell the island to Mr. Lattig as administrator. Mrs. Poole gave the deed to him. I didn't sell it as administrator. She sold to Mr. Lattig. I sold the balance of the land to Lattig as administrator. The usual mode in crossing Snake River along there is by boat—ferry boat or skiff. I never knew of any person fording it only in certain places. When I spoke of the water running in crevices or something like that during extreme low water, I had reference to the channel below the Huntington bridge about fifteen miles. The water there runs right in crevices in the rocks and you can see the rocks sticking up and the

water running below in places in rapids; that is what I call Bay Horse Rapids, about twenty miles below Huntington.

(Cross-examination by Mr. PAINE:)

"Mr. Poole was living on the island in 1883 and afterwards he must have moved to his place outside. He had a house on the island, he didn't remove it from there and I don't know what became of it. It was not there when I was administrator of the estate. It was my understanding that Mr. Poole was in exclusive possession of this island from 1883 up. I know he always claimed it from what he told me and from what other people said. He claimed the right to run stock there, and he always run stock there. I
38 never heard Mr. Greene or Mr. Sparks run cattle on that island under a claim of right. It was my understanding that Mr. Poole considered it his property and held this island as abutting property; that was one understanding, and another one was that he bought this property and it was his from the fact that he bought it and had possession of it. I didn't give the property in as taxes at all, because there was no record of it. It never was assessed. I don't think there was any record of it ever made. I paid the assessment only on the 155, I forget just what it is, it is a fraction, that is all of the land I paid taxes on. I understood he got hold of that land by his possession on the east side. He bought that land in the first place, and then my understanding was in case of any dispute in any way that land would hold the island as abutting land, but there never was any dispute."

(Redirect by Mr. KENWARD:)

"Claimed all of the land, was my understanding. I claimed it because Mr. Poole had bought it of Shell and had been in possession of it for twenty years, occupying, controlling and managing it."

Plaintiff here offers in evidence deed from witness as administrator of the Poole estate, to Mr. C. P. Lattig, of the island and of the main land on the Idaho side opposite the island.

Witness continues: "When I said I didn't include the Poole Island in the deed, I was mistaken."

(Recross-examination by Mr. PAINE:)

"Mr. Shell was the man that owned that island. I don't know how he owned it, he was just living on it. I don't know how long he was in possession. I never heard of him owning any land
39 except the Poole Island. I always considered Mr. Poole owned the island from the fact that he bought it from Mr. Shell as stated, that was the source of his title, that was my understanding, I never thought anything about it, that the land abutting it would hold it across the channel, that was my understanding at any rate. During the time I was administrator I didn't do anything on the island except to use it as pasture. I couldn't say whether other people used it as pasture during the same period. I never heard of anybody using it for any private purpose."

(Redirect by Mr. KENWARD:)

"The property was leased part of the time to one George Thebo, he ran cattle on the island. Mrs. Poole lived on the property and looked after it for me while I was administrator of the Poole estate. Mr. Shell had a house on the island, it was there when Mr. Poole bought him out. The island was fenced in places. The first time I meet Mr. Shell was in 1883, he was on the island then. I suppose he had been there a considerable period before that. It was all brand new to me and I could not say very far back of that, but it was called the Shell island, he must have been the owner of it before that."

(Cross-examination by Mr. HAGA:)

"Mr. Poole bought this island from Shell, that is what he informed me. I didn't ask him the date, this was in 1883. Shell owned none of the main land to my knowledge, I couldn't say how he claimed to own the island, I suppose just by right of possession. I couldn't say how long after that Mr. Poole bought the land across the channel on the Idaho side. I always considered Mr. Poole had the best right to the island. He bought it from Shell and
40 always had possession of it. I suppose Mr. Shell moved off the island when he bought him out."

C. P. LATTIG called as a witness in his own behalf, testified as follows:

(Direct examination by Mr. KENWARD:)

"I reside at Payette. I first came in contact with the Poole property in the fall of 1903. I purchased the Poole Island from the administrator with the rest and paid for it; Mr. Thebo was in possession at that time. He was using the island under a lease."

Plaintiff was here handed plaintiff's exhibit "A" and testified, that: "Mr. Thebo was in possession of the property under this lease, signed by Mrs. Poole and Mr. Thebo and this is the lease referred to by Mr. Anderson, the administrator of the Poole estate, as the one that was executed by Mrs. Poole by his consent."

"He was pasturing and cutting hay on it. He remained in possession until the first of March, 1904, under the lease."

Here plaintiff introduced his Exhibit "B" testifying "that the same was a release of said lease from said Thebo to me."

"I went to see Mr. Scott with reference to his being on the island about the latter part of January, 1904, and he told me he was taking care of Mr. Thebo's cattle. I said 'I understand you are looking after Mr. Thebo's cattle, is that correct?' and he said, 'it is.' During the summer of 1904 I found Mr. Scott and Mr. Thebo over there again and they were making hay jointly."

Plaintiff offers in evidence as Exhibit "E", copy of Government field notes and the same are admitted in evidence and are as
41 follows: (Original field notes filed with clerk of Supreme Court as per stipulation of counsel.)

Plaintiff offers in evidence as Exhibit "D", a map of the meander line in Sections 15 and 22, Twp. 9 N., R. 5 W., certified by D. A. Utter, a licensed surveyor. The same is admitted as plaintiff's Exhibit "D" with the word "slough" stricken out where it appears on such map. (Original map filed with clerk of Supreme Court as per stipulation of counsel.)

Witness continues: "I assisted in running the lines which represent that survey. I dragged his chain for him. I am a civil engineer by occupation. I can testify as to the correctness of that map. The survey was made December 5th, 1905. The east channel at that time was so shallow at various points you could hardly run a boat on it. The map designates the depth at various places. The first measurement is one foot at the head of the island, the second one foot, about midway down, 1 foot, two-thirds of the way down one and one-half feet, near the lower end two feet, extreme end it is three feet; that is the average depth. We took several soundings across the channel. The main channel is west of Poole Island. The west channel as compared with the east channel is a great deal wider and deeper. Since I received my deed to the Poole Island I have paid all taxes assessed against the island. There has been no taxes assessed against Poole Island during that time. Mr. Scott first attempted to take possession of the island as far as I know, the latter part of January, 1904; that is the time I went over to see him about the cattle. From that time on he has attempted to hold pos-
42 session of the island. I served notice on him to vacate the island; it was about two weeks later than the date I have just given." Said notice was here introduced and admitted, and marked "plaintiff's Exhibit "F."

"Snake River is a very rapid, changeable, very uncertain, you might call it a treacherous stream; during the spring freshets it is a rapid, turbulent torrent, it drops from that in June, July, August and September in the fall of the year to a more slow sluggish stream filled with numerous sand-bars. Mr. Scott's possession of the island has been contrary to my wishes at all times. Mr. Scott was living on the Green land in 1904, he was there when I served notice on him; he was farming part of the Green land. Mr. Sparks owns the land east of the slough opposite the upper end of the island and just above the Green land."

It is further stipulated between the respective counsel that at the time of the commencement of this action, plaintiff was the owner of Lots 1, 2, 3, and 4, Sec. 15, Twp. 9 N., R. 5 W. This stipulation being entered into with the understanding that the patent to Lots 3 and 4 be introduced and that the patent to Lot 1 reads the same as patent to Lots 2, 3 and 4 with the exception of the description.

Witness continues: "The increased irrigation in this country affects Snake River by lowering it each year during the low water period. I have noticed it for the last two or three years, each year it seems to be decreased in volume."

(Cross-examination by Mr. PAINE:)

"I have been acquainted with what is known as Poole Island about five years. I never heard of Mr. Green claiming any part of the island. Mr. Sparks came to me after this case was started
43 and told me that he did not and never did, claim any interest in the island. I took possession of the island under contract in January, 1904, my deed to it was made about July 2d, 1904. I took or undertook to take possession of the island in January, 1904; I got my administrator's deed about the 2nd of July, I think, of that year. I had an agreement with Mrs. Poole. I have never paid any taxes on the island."

(Cross-examination by Mr. HAGA:)

Q. "You have furnished affidavits to the assessor, I presume, from year to year as to the property subject to taxation which you acquired?"

A. "I have gone thru the usual formality whatever that is."

Q. "Signed the papers describing the property on which you paid taxes or intended to?"

A. "Yes, sir."

Q. "In these affidavits why did you not include the island?"

A. I didn't make out the list, the assessor makes out the list.

Q. You swore it was a true list of the property you had, didn't you?

A. Yes, sir, as far as I know.

Q. But it didn't include the island?

A. No, sir.

Q. Have you any of your tax receipts with you?

A. No, sir.

Q. Why didn't you list the island as part of the property that taxes ought to have been paid on?

A. I don't know why I didn't, it didn't occur to me.

"When I began negotiations for the purchase of the Poole
44 Island I first negotiated with Mrs. Poole. I asked her who held possession of it. Mrs. Poole told me that they owned the island, were in possession of it. I think she said they had been in possession of it for ten or twelve years; she said Mr. Shell had possessed it before and they bought it of him. I believe that is the way she traced her ownership to the island. I don't think she said anything else about any one else having been in possession of the island or attempting to take possession of it at any time. I have observed the raising and falling of water in Snake River about three years. It has been very noticeable, I attribute it to irrigation somewhat and to the dam projects. When the Twin Falls dam was installed the river fell 1.2 feet. On the map which I have introduced (Plaintiffs' Exhibit "D") the figures 1200 at the lower end of the river represent the width of the stream, I might say that was an estimate; as far as I know the distances across the main channel were all estimated, while the rest were measured and the figures 1,000 right above the "R" in the word 'river' represents the width

of the channel at that point, and the figures '900' above the word 'Snake' represents the width there. The figures 385 and 370 etc. represent the width of the channel as we found it on December 5th, 1905, by actual measurements from the water's edge. The space between the meander line and the water channel as shown on the map represents land. The strip of land between the meander line of Lots 1, 2, 3, and 4 and the water's edge as we found it varies from 100 to 500 or 600 feet in width. That lays between the meander line and the water's edge. We found the initial government corner and had the government field notes in making our
45 survey. The acreage shown in my patent for Lots 1, 2, 3 and 4 is the acreage represented between the meander line and what we marked "section line." The figures on the island '1220' between Poole and Island represent the width of the island from the water's edge on one side to water's edge on the other side. Since I have become familiar with this island it has never overflowed. I have seen high water within a foot and a half from the top of the bank. The island is generally what is called smooth, it is covered with grease-wood and sage-brush, grass and willows; it is about 8,000 feet long and the river has about six feet fall along the length of this island. I cut wood on the island in the winter of 1903-4. The average depth of the west channel varies from 3 feet to what would swim a horse. When I referred to Snake River as being a very rapid, treacherous stream, I was not comparing it with any particular stream. The river being treacherous does not depend altogether on its rapidity, but on the bottom sand-bars and rocks. There are no rocks in Snake River of any consequence, that I know of. After Mr. Scott went on the island in January, 1904, I have not had any good of it. Mr. Scott as far as I know has had possession since that time—he has been there. I knew a warranty deed was better than a quit-claim deed. I don't remember why she didn't give a warranty deed."

(Cross-examination by Mr. PAINE:)

"The measurements of the width of Snake River west of Poole Island shown on Exhibit "D" were all estimated. There was land between the meander line and the east side of the river; I ran the meander line that the government originally ran. The land
46 west of that I would call riparian land. When I first visited the island I found practically no improvements in the way of buildings, none whatever, and not very much fence, just what was left of a corral I think was all. That was in 1903. I was on the island before that, but only as a visitor. I have made no improvements on the island. Mr. Scott has put some on."

(Redirect examination by Mr. KENWARD:)

"The land between the east channel and the meander line has a good quality of soil, it is what you would call made land—accretion. The land on both sides of the channel is very similar in quality. Channels are very common on all those low lands, especially from the Payette River towards Weiser."

(Examined by the COURT:)

"The land between the meander line and the river is several feet lower than the main land, I should judge on an average four to five feet. The meander line actually runs on the high ground all of the way through, it does not get on the lower ground at all. The shaded part of the map, Plaintiff's Exhibit "D", represents the bluffs. Immediately to the east of the shaded part of the map is the low ground; between the shaded part and the meander line the land is the same as the main land; probably not one-fourth as a whole, probably not one-sixth of the land between the main land and bluff is high land. The reason I never took actual possession of the island is that I contracted for it, Mr. Thebo was in possession under his lease, and when this lease was released, I found Mr. Scott in possession.

D. C. CHASE, called as a witness for plaintiff, being duly sworn, testified as follows:

47 (Direct examination by Mr. KENWARD:)

"I have lived in Payette about twenty-two years. I have been somewhat acquainted with Snake River during that time. In low water around Payette and this land in dispute, I have waded across the east channel without taking off my clothes. That was the latter part of September I waded it; it was about 18 inches deep. I should think that was the deepest place, I have seen teams go across there and wagons."

(Cross-examination by Mr. PAINE:)

"At first there is a raise usually in March or April and it goes down a little and then comes up again and the big raise is in June generally; it recedes by the middle of August, by that time we have what we call low water. There is not another raise until the next spring. From the 15th of August to about the 1st of October is the lowest stage of the river. The water has been decreasing in volume considerably in late years, I know that in past years we have had high water, higher than in late years. By late years I refer to a period of perhaps seven or eight years. When I first became acquainted with the river it carried considerably more water during the summer than at the present time for the reason that they had not been taking out as much water for irrigation as they are now at Twin Falls and Minidoka; it is more noticeable in September than at other times of the year."

A. J. MEED, called as a witness for plaintiff, testified as follows:

(Direct examination by Mr. KENWARD:)

"I have lived in Payette for eight years, have known Robert Green six or seven years, know his place below Payette in
48 litigation here. He told me he didn't have any interest in the island, that he didn't lay any claim to it, that Mrs. Poole owned it."

(Cross-examination by Mr. PAINE:)

"He said he never claimed any interest in it and didn't then. I asked him why if Mrs. Poole could own part of the island he could not, he said Mrs. Poole owned the island and had owned it for some time and that he didn't own it. I believe he said there was some mineral right or something like that, I don't remember just what, it was a long time ago; that they had owned the island a long time ago. I guess he said she owned it by virtue of a mineral location. I don't remember the year he said that mineral location was made; he said they had owned it a long time. This conversation was had some five or six years ago."

(Cross-examination by Mr. HAGA:)

"I said Mr. Green told me Mrs. Poole owned it, I believe through some mineral locations that had been made there; that is what he said. Mr. Poole made the mineral locations and Mrs. Poole as a widow succeeded to his rights to the locations. I don't know when the locations were made. I didn't understand whether the whole island was covered by these locations or not. That, as I understand it, was the source of their title as claimed by Mr. Green. I do not remember much about what Mr. Green said as to the source of Poole's title. He said Mrs. Poole owned it and he did not claim it."

J. E. SCOTT, the defendant, called as a witness in his own behalf, testified as follows:

(Direct examination by Mr. HAGA:)

Witness is shown paper marked "Defendant Scott's Exhibit One." "That is my signature on Exhibit One and my affi-
49 davit on the lower part of that paper."

Defendant Scott's Exhibit One is admitted in evidence; the same is as follows, to-wit:

"Know all men by these presents, That I, John E. Scott, of Payette, Canyon County, Idaho, a citizen of the United States and over the age of twenty-one years, do hereby claim by prior possession, occupancy, and actual residence thereon the following described tract of land, being a portion of the unsurveyed public domain of the United States of America, being that certain island situated in Snake River generally known as "Pool Island" and beginning at a point about forty rods west and forty rods south of the north-east corner of Section 15, Township 9 north, Range 5 west, B. M., and extending thence up said river for a distance of about one and one-half miles and containing not to exceed one hundred and sixty (160) acres of land in compact form, and entirely surrounded and bounded by the two channels of Snake River.

"This declaration is made and filed pursuant to the provisions of Chapter 4, Title 10, of the Code of Civil Procedure of the Revised

Statutes of Idaho, 1887, and for the purpose of securing the benefit of said chapter.

"Dated this 25th day of September, 1905.

JOHN E. SCOTT.

"STATE OF IDAHO,
County of Canyon, ss:

John E. Scott, being first duly sworn, upon his oath deposes and says: That he is the person who made the above declaration; that the land described embraces approximately but not to exceed one hundred and sixty (160) acres of land. And this affiant further says that he holds no other claim under the provisions of Chapter 4, title 10, of the Code of Civil Procedure of the Revised Statutes of Idaho, 1887; and to the best of this affiant's information and belief no part of said land is owned or lawfully claimed or held by any other person or persons, but that the legal title thereto, as this affiant is informed and believes, stands in the United States of America, and that the said island is part of the unsurveyed public domain of the United States, and this affiant claims the same for the purpose of cultivation and use for agricultural and grazing purposes.

JOHN E. SCOTT.

"Subscribed and sworn to before me, this 25th day of September, 1905.

[SEAL.] CHARLES B. COXE,
Notary Public.

(Endorsed.)

"Filed at 30 minutes past 9 o'clock A. M. this 27th day of September, 1905, and duly recorded in Book 2 of Miscellaneous Instruments at page 122.

JOHN A. TUCKER,
Ex-Officio Recorder.
By MATTIE L. TUCKER,
Deputy."

"I have lived in the vicinity of Payette five years. I first became familiar with the island known as Poole Island along in the spring and summer of 1903. I first went on the island with a view of remaining there January 14th, 1904; as to the nature of my occupancy since that time I have harvested it through the summer and cut the hay, and fed it during the winter and have lived on it during that time continuously. Jakoaks lived on it from January until May or June, 1904, since then no one besides myself has lived on it. I have had the benefit of what has been raised there and have appropriated it to my own use; no one but myself is occupying it or cultivating it now. I had a conversation with Mr. Lattig on the island in the spring of 1904. He rode up and stood and I went out and spoke to him; he asked me if I was feeding these cattle there, and I told him I was at the present

time, and told him why I was on account of the man going away, that I promised to feed them until Monday, but I said 'that is not what I am here for,' I said 'I am here to hold this ground.' 'Why,' he said, 'I have a deed to this ground.' I asked him how he got a deed to unsurveyed land and he said it was a quit claim deed; I said 'you can get that to these hills back here if you want it,' or somethink like that. He went on to state then that he would have to notify me that I was a trespasser, I said 'all right' that I would have to give him the same notice, that I had a squatter's right there and that was my home."

(Cross-examination by Mr. PAINE):

"That conversation was the last part of January, 1904, that was about all that was said in regard to the possession of the island at that time, I believe. This other man asked Mr. Lattig how he could hold an island and Mr. Lattig said 'by possession,' and I told him that was what I had there and I expected to keep it. Mr. Lattig has had no use of the island since I went there, neither has Mr. Greene or Mr. Sparks; they have not pastured any cattle on there or cultivated it in any way. For the purpose of obtaining title to the island I made application for a survey and had a survey made. The survey was made by William Noot."

52 (Redirect examination by Mr. HAGA):

A true copy of the plat showing the survey of Poole Island certified by the Surveyor General for Idaho and by the Register of the United States Land Office at Boise, Idaho, was received in evidence as "Defendant Scott's Exhibit No. 4," and a copy thereof properly marked for identification is attached hereto.

Defendant Scott offered in evidence as "Defendant Scott's Exhibit No. 5, a certified copy of the field notes of the survey of the island in question, the same being duly certified to by the United States Surveyor General for Idaho. The same being as follows, to-wit:

"Pool Island.

Secs. 15 and 22, T. 9 N., R. 5 W.

Survey commenced June 16, 1906, and executed with a Strassberger's Standard Engineer's Transit with 9 inch telescope, six inches horizontal plats, double verniers placed opposite to each other reading to single minutes of arc.

The instrument was tested for levels, line of colimination, etc., and found in complete adjustment June 16, 1906.

The magnetic declination of 20° 15′ E. cor. of secs. 14, 15, 22 and 23, T. 9 N., R. 5 W., B. M., is in lat. 44° 07′ N., long. 116° 55′ W.

W. NOOT,
U. S. Deputy Surveyor.

"Resurvey and Survey, Subdivisions of T. 9 N., R. 5 W.

From the cor. of secs. 14, 15, 22 and 23, T. 9 N., R. 5 W.,
53 which is a sandstone, 8x8x6 ins., (instead of a post) above ground,

This cor. was found the proper dist. and direction from the cor. of secs. 13, 14, 23 and 24, and the ¼ sec. cor. bet. secs. 14 and 15: and secs. 22 and 23.

Thence I run

West, on a true line bet. secs. 15 and 22.

Over level land.

16.00 Wagon road, bears N. and S.

20.10 Right bank of east channel of Snake River, course northerly.

Old meander cor. has been destroyed by erosion of the banks.

Set a post 3 ft. long, 4 ins. sq. 24 ins., in the ground, for meander cor. of fracl. secs. 15 and 22., marked M. C. on W. T. 9 N. on E. R. 5 W., S. 15 on N., and S. 22 on S. face, dig a pit, 36x36x12 ins. 8 ft. E. of post, and raise a mound of earth 4 ft. base, 2 ft. high E. of cor.

To determine the dist. across I set a flag on line on gravel bar, then from meander cor. measure a base line south 5 chs. to a point from which the flag bears N. 50° 12′ W. therefore the dist. is tang. 50° 12′ x base, or 1.20 x 5.00 equals 6.00 chs. which added to 20.10 chs. makes

26.10 Gravel bar covered with dense undergrowth. Thence across bar to high water mark on Pool Island on left bank of channel.

29.36 Set post 3 ft. long, 4 ins. sq., 24 ins. in the ground, for meander cor. of fracl. secs. 15 and 22, marked M. C. on E., T. 9 N., on W. R. 5 W., S. 22 on S., and S. 15 on N. face, dig a pit, 36x36x12 ins., 8 ft. W. of post, and raise a mound of earth 4 ft. base, 2 ft. high W. of cor.

Continue over level land through dense undergrowth.

40.00 Set post, 3 ft. long, 3 ins. sq., 24 ins. in the ground, for ¼ sec. cor., marked ¼ S. 15 on N., and 22 on S. face, dig pits,
54 18x18x12 ins. E. and W. of post, 3 ft. dist., and raise a mound of earth 3½ ft. base, 1½ ft. high N. of cor.

42.36 Right bank of slough 1.60 chs. wide. course N. from SW. Continue in dense undergrowth.

49.95 West Bank of Pool Island.

Set a post, 3 ft. long, 3 ins. sq., 24 ins. in the ground, for meander cor. of fracl. secs. 15 and 22, marked M. C. on W., T. 9 N., on E., R. 5 W., S. 15 on N., and S. 22 on S. face, dug a pit, 36x36x12 ins., 8 ft. E. of post, and raise a mound of earth 4 ft. base, 2 ft. high E. of cor.

Land level.

Soil, 1st and 2nd rate.

Undergrowth wild rose, and black willow.

No timber.

Land covered with dense undergrowth 23.85 chs.

JUNE 18, 1906.

"Meanders of Pool Island.

I commenced at the meander cor. on east side of Pool Island, on line bet. secs. 15 and 22, 29.36 chs. west from the cor. of secs. 14, 15, 22 and 23, heretofore described.

Thence I run

With meanders in Sec. 15

Over level land.

N. 3° 50′ E. 4.55 chs.
N. 4° 15′ W. 13.44 chs.
N. 7° 30′ E. 6.30 chs.
N. 15° 15′ E. 13.69 chs.
N. 26° 30′ E. 13.56 chs.

Through dense undergrowth. At beginning of course leave undergrowth.

N. 21° 30′ E. 11.93 chs.
S. 66° 00′ W. 11.63 chs.
55 S. 28° 30′ W. 7.15 chs.

Through dense undergrowth. At end of course leave dense undergrowth.

S. 9° 30′ W. 5.50 chs.
S. 4° 00′ W. 9.14 chs.
S. 25° W. 10.09 chs.
S. 41° W. 8.76 chs.
S. 10° W. 11.42 chs.
S. 12° W. 2.93 chs.

To bank of slough comes from S. 2.72 chs. wide.

S. 39° W. 6.72 chs.

At 2.72 chs. enter dense undergrowth.

West 2.33 chs.

To meander cor. of fracl. secs. 15 and 22 on W. bank of Pool Island.

Land level.
Soil, 1st and second rate.
Undergrowth willow, grease wood and wild rose.
Land covered with dense undergrowth 38.80 chs.

JUNE 18, 1906.

From the meander cor, on E. side of island on line bet. secs. 15 and 22.

I run with meanders in sec. 22

Over level land.

S. 0° 45′ W. 3.04 chs.
S. 12° 15′ E. 7.65 chs.
S. 16° 00′ W. 8.00 chs.

Through dense undergrowth. At end of course leave undergrowth.

S. 46° 30′ W. 7.81 chs.
S. 42° 15′ W. 11.77 chs.

S. 56° 0′ W. 15.00 chs.
S. 62° 00′ W. 12.18 chs.
N. 23° 20′ E. 31.40 chs.
N. 36° 30′ E. 6.95 chs.
N. 11° 00′ E. 7.00 chs.
56 Through dense undergrowth. At 4.50 chs. slough 2.50 chs. wide course N. E.
N. 9° 45′ W. 6.17 chs. Through dense undergrowth to meander cor. fracl. secs. 15 and 22, on W. bank of Pool Island.
Land level.
Soil, sand, 2nd rate.
Undergrowth willow, grease wood and wild rose.
Land covered with dense undergrowth, 18.67 chs.

JUNE 19, 1906.

General Description.

The banks of Pool Island are about 3 to 5 feet above high water. The soil is a sandy loam, covered with wild rye grass in the open and some greasewood, willows and wild roses in patches.
The island is not subject to inundation.

W NOOT,
U. S. Deputy Surveyor.

(Duly certified.)

WITNESS continues: "I have taken steps to secure title to this land."
Witness shown "Defendant Scott's Exhibit No. 6," "I am the J. E. Scott mentioned in that instrument. It was given to me at Boise yesterday in the U. S. Land Office."
Paper marked "Defendant Scott's Exhibit No. 6" is offered in evidence, to the introduction of which counsel for plaintiff and for defendant Green objected as follows: "We object to the offer because the same is not pleaded and is incompetent, irrelevant and immaterial," which objection was sustained by the Court, and an
57 exception to the ruling of the Court allowed defendant Scott.
The said exhibit being in words and figures as follows, to-wit:

"Receiver's Duplicate Receipt No. 10091. *Application No.* 10091.

Homestead.

RECEIVER'S OFFICE, BOISE, IDAHO, *July* 8, 1907.

Received of John E. Scott the sum of Fifteen dollars 18 cents; being the amount of fee and compensation of register and receiver for the entry of Lots 5, 6, 7, Sec. 15, Lots 6 & 7, of Section 22 in Township 9 N. of Range 5 W., under Section 2290, Revised Statutes of the United States.

EDWARD E. GARRETT, *Receiver.*

$15.18."

The patent from the United States Government to Samuel W. Poole reading in part as follows: "for Lots numbered two, three, and four of Section fifteen, Township nine North of Range five West of Boise Meridian in Idaho, containing seventy-three acres and thirty hundredths of an acre according to the Official Plat of the survey of said Lands, returned to the General Land Office by the Surveyor General," was received in evidence as "Defendant Scott's Exhibit No. 7," the same being dated May 29th, 1894.

The patent from the United States Government to Robert Green reading in part as follows: "for the lots numbered one and two and the South East quarter of the North East quarter of Section twenty-two in Township nine North of Range five West of Boise Meridian in Idaho, containing ninety eight acres and seventy-five hun-
58 dredths of an acre according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor General," was admitted in evidence as "Defendant Scott's Exhibit No. 8," the same being dated February 4th, 1895.

WITNESS resumes: "I think I have been over every foot of the island frequently, except where the brush is so thick I can't get through. I have noticed the conditions of it and the elevation above high and low water and whether it is subject to overflow or not. It has not overflowed since I became familiar with it. I could find no indications of it having overflowed. It is covered with sage brush and grass, wood and willows and wild roses and wild grass, there are a few willows or trees on it 6 or 8 inches through. Wood is being cut from off it for fuel. There are stumps there as though a good deal of willows have been cut. The elevation of the island I should judge is close to 10 feet above low water and 3 to 7 feet above high water. I have a well on it; I drove a pipe 17½ feet deep, that is the way I get water. I have observed the channel on the east side as to its depth and width at different stages of water. The last time I measured it was about the 15th of June this year, with Dave Lamb. I measured it right opposite the Green house. I took the distance across from water's edge to water's edge and it was 397 feet. We measured the depth of the channel also. We crossed in one place and measured it three or four times in crossing and the average depth was from 9 to 14 feet; the shallowest was 9 and the deepest was 14. We measured it also a short distance above that as
59 we came back. The deepest place was 14 feet and the shallowest place we struck going over was 9 feet; that was the time Mr. Lamb was with me, June 15th, 1907. I have observed the depth at other times quite frequently. I have crossed the channel once or twice a week for three years or more, crossed it with a boat. Two years ago this coming fall I crossed it in August and September without a boat, on horseback, and in September, I think, 1905, I waded across; that was the only time. The water was then the lowest I ever saw it; where I waded across was the shallowest place I could find; there was two or three riffles across there where I waded. I have observed the banks all along that east channel, they are washed down until they are pretty nearly perpendicular. The lowest water we had two years ago to the

highest point of the island would probably be close to 15 feet, the highest point on the bank; the banks are regular. The river in high water remains in its channel; I have observed the west channel, I believe it is a little higher on that side. The west channel is quite a little larger, wider and deeper than the east. The flow of the water in the east channel does not indicate that it had a very big fall, the weight of the water pushes it along of course, but it is very smooth in high water; no difficulty crossing it with a boat; it is not so rapid and turbulent as to make it dangerous to cross it with a boat; I have never known the east channel to go dry; there is no stagnant water there at any time. The picture marked "Defendant's Exhibit 9" was taken by a photographer in town; I was with him at the time. It shows the east channel of Snake River east of the island; Poole Island is shown there across the channel. This is looking right across Poole Island and that is looking up the river; it was taken about a half mile from the upper end looking up stream, about 40 rods above the section line nearly half a mile from the upper end of the island. I was with him at the time. It was taken the 18th of last month (June, 1907)."

Picture is received in evidence as "Defendant Scott's Exhibit No. 9" and is as follows to-wit:

"That shows the conditions of the island and the channels as they were at that time."

Witness is shown picture marked "Defendant Scott's Exhibit No. 10." "That is a picture of the channel from the same point, but looking down stream, the camera being at the same point and taken at the same time. This point was about opposite the Poole house. That is the island you see across the channel there."

Picture referred to is admitted in evidence as "Defendant
61 Scott's Exhibit No. 10" and the same is as follows, to-wit:

(Cross-examination by Mr. KENWARD:)

"I didn't know Mr. Thebo was renting from Mr. Lattig when I went on there. I didn't know anything about it. I didn't know anyone was in possession until I went on there. I knew it was claimed. I heard Mrs. Poole claimed it; everybody I talked to told me that. I didn't talk to everybody; I talked to Mrs. Green, she said Mrs. Poole claimed the island. I don't know as I talked to forty or fifty different people on the subject; everybody I spoke to said Mrs. Poole claimed the island. I went over in a boat. I took Mr. Green's boat and went over. I took it with the place when I rented it in the fall of 1903; I had Mr. Green's place leased, but I leased it for another party, I was the original lessee. I had the green
62 place rented at the time I went onto the island and took possession of it. I have a lumber house there; got it in the fall of 1904. I had a tent to start with. I went on the island with the

full knowledge that Mrs. Poole was claiming the land. I had heard Mr. Lattig had purchased it at that time.

"Mr. Jacoaks moved on the island because he wanted a part of it. We didn't go on there as partners, he was to have part and me a part. We supposed there was enough land for two. I went on one day and he the next. I never saw Mr. Jacoaks until he went on. The water was not exactly at its highest point on June 18th when we took this picture, but pretty close to it; it had fallen a little. The water this summer has been the highest it has been for two years; in 1904 it was higher than this year. The water does not fall to a depth that you can wade it at the point where the picture is taken exactly. The upper end of this picture is where the shallowest place is and the lowest end looking down the stream is another picture. The picture was not taken at the widest or deepest place of the east channel; there is one place as deep or deeper than where the picture shows. When I made these measurements with Mr. Lamb the water was not quite at its highest; it had been higher; it had been at its highest five or six days before, I think; I think the high water must have been at the 10th. It was not much higher, several inches. I did not retrace the meander line along the west side of the lots east of the island, I started from a section corner 1.5 miles back from the island, east. I didn't make an actual measure. I observed it falling, that is all. About the middle of June is usually about the highest water, but I noticed when we took that picture that
63 the water had fell a little along the bank from the marks. We found the water 14 feet deep in one place. During low water we cannot wade it at that place; we can wade it on the riffles."

(Cross-examination by Mr. PAINE:)

"I have not seen any mining on the island since I went on there; I have saw prospecting holes, that is all."

WILLIAM NOOT, called as a witness for defendant Scott, testified as follows:

(Direct examination by Mr. HAGA:)

"I am an engineer and surveyor by occupation. I have been engaged in that business all my life—over fifty years. I have lived in Payette eleven years. I am County Surveyor of Canyon County. I have known Poole Island since June, 1906; I hadn't been on the island before, but knew of its existence. I had seen the river along the island on both sides. In June, 1906, I made a survey of the island on instructions received from the Surveyor General, which I have here. I am the person mentioned in "Defendant Scott's Exhibit No. 4." I made the survey shown on this plat. I received instructions from Mr. Eagleson, the Surveyor General. I made the survey under the instructions contained in paper marked "Defendant Scott's Exhibit No. 11." I made field notes of the survey and furnished them to the Department. I measured across the channel on section line between sections 22 and 15 and the distance across

the east channel is exactly 6 chains; a chain is 66 feet, that would make 396 feet from water's edge to water's edge. At this end on account of the old meander stake having been destroyed, we used another one on the bank and from that stake across to a stake on the opposite side just beyond the water mark it is 396 feet; that
64 is, across the water. From the meander corner on the east bank of the east channel to the meander line on the island the distance would — 396 feet across the water, and then to the main land is another measurement of 326 feet. I didn't observe the depth of the water in the east channel. I only tried it in one place, with my ten foot rod and I couldn't touch bottom. I don't know whether that was the deepest place or not. The south end of the island is almost clear of brush, there is a few trees at the south end, large trees at the water line; then on both sides there is sparse brush and heavy willow brush on the north end, and on the edges, and we had great trouble to cut it; then a little further in there is some grease-wood, sage-brush and wild roses. The elevation of the island above high water at that time was four or five feet; that is what I made it on my notes, that was June 16th, 1906, during high water. I couldn't see any indications that the island had ever overflowed. Compared with the main land on the east side of the east channel it is more like the Oregon side of the land than it is the Idaho side, but on this Idaho side south, and east of where I took the section line across the river is sand banks and very high ground; and then a little north and east we have cultivated land and it seems to be a richer soil and better soil until you get almost up to where Mr. Lattig lived, and then we come back to the same or similar sage-brush land that we get on the Oregon side."

(Cross-examination by Mr. KENWARD:)

"The main channel of Snake River is to the west of the Island. The island shows indications of having been pastured and used for hay ground. The distance across the water or east channel
65 was 396 feet; then it was 3 chains and 26 links across the second island and the slough where I commenced my meander of the island; the first measurement was 6 chains and across to this bar on this island I told you about is 3 chains and 26 links from the west side of the east channel to the main land; then you come to the main land on the island. In measuring across the channel I commenced about three feet on this side of the water's edge and measured to a stake right on the water's edge on the other side. I don't know how far the water would get back when it was low, it would never get as low as 300 feet."

(Redirect by Mr. HAGA:)

"My field notes to the Surveyor General stated the survey correctly as I made it."

JOHN A. PEARCE, called and sworn as a witness for defendant Scott testified as follows:

(Direct examination by Mr. HAGA:)

"I have noticed the measurements of the width of the east channel during the last thirty days; Mr. David Lamb and Mr. Scott were with me at the time we measured it right opposite Green's house 397 feet from water's edge to water's edge. We found it to be from 9 to 14 feet in depth as near as we could get at it, the shallowest place 9 and the deepest 14 feet."

(Cross-examination by Mr. KENWARD:)

"Mr. Scott asked me to measure the water."

(Cross-examination by Mr. PAINE:)

"We sounded the river from near opposite Green's house just a little south, three or four or five places, something like that, about 25 to 30 feet apart as we crossed, I think we sounded three times
66 going over and two times coming back; we came back ten or fifteen yards up the river above the point where we crossed. We did this two or three weeks ago. I don't know as the water was at its high stage then, I think it has been higher since, I am not sure; there has been a great deal of change in the water since then."

C. P. LATTIG, recalled by plaintiff:

"I remember the occurrance of Mr. John A. Pearce wishing me to sign a paper for Mr. Scott; it was in 1905; he and Mr. Watts were on bicycles. Mr. Pearce halted me and asked me to sign a paper for Mr. Scott. I told Mr. Pearce I was not signing papers for Mr. Scott and then rode on. He did not read the paper to me or furnish me with a copy; he never read a notice to me. This is the only time he attempted to serve any paper on me. I knew nothing of Mr. Scott's intention of having the island surveyed by the government, the first I learned of a survey was from Mr. Noot, and then I got the impression that he was simply locating the various lots along the river, that was when Mr. Noot was down there surveying. Mr. Noot gave me no intimation that he wwas surveying it for the government."

B. F. LATTIG, called as a witness for plaintiff in rebuttal, testified as follows:

(Direct examination by Mr. KENWARD:)

"I am acquainted with defendant Scott, see him often, go over to the island to talk to him. I had a conversation some time last fall in reference to this notice of his intention to apply for a survey of the island and its service, Mr. Scott said he had served the notice on all the adjacent land owners, excepting my brother Charlie (C.
67 P. Lattig). I am acquainted with the east channel along Poole Island. I see it every day. I saw it last summer at the low water stage, I am within ten rods of the stream and see it every

day. In low water the current is not very swift only over the riffles, I can wade it in several places, there is places, though I don't think it can be waded. I never tried them, but there is places it can be waded across. I am on the island now in partnership with Mr. Scott in the poultry business. I am the party who served notice on Mr. Lattig, the plaintiff for Mr. Scott, of his intentions to apply for a survey of the island. I asked Mr. Lattig to sign the notice—receipt for it. Mr. Watts was with me. There is one place that you can get stranded on the rocks easy enough with a boat during low water, I have several times been stranded and have to find a narrow channel to get through. I would consider the main channel to be on the west side of the island."

(Cross-examination by Mr. HAGA:)

"Low water is in August and September. The boat which I spoke of as being stranded was stranded several times last summer in low water between the island and the main land. I was going back and forth. I went over to the island to visit Mr. Scott occasionally; that was the only business I had on the island."

S. L. SPARKS, called as a witness for defendant Green testified as follows:

(Direct examination by Mr. PAINE:)

"I reside in Section 27, Twp. 9 N., R. 5 W., B. M. have lived there since 1880. I have seen it every year I believe, with the exception of a year or two that I was away. During that time the first one who claimed to own the island and who exercised possession
68 over it was Sam Shell, and then Samuel Poole and Tom Pence, then Samuel Poole and Robert Green, and I claimed a part of it, the south point. Robert Green, the defendant in this case, claimed an interest in the island from the time he proved up or filed on that land, I don't remember which, I don't remember the date of that filing now; it is what is known as the north half of Section 22. He proved up some time after 1893, I don't remember the year. Mr. Green was in possession of it as much as anybody. The possession anyone had in that island from 1894 to the present time was to run their stock there. Poole, I think, cut some hay part of the time; he had before that time and after that time, I think; I don't remember when he stopped cutting hay. Green run stock there. He claimed he had as much right to the land in front of his as Poole had. I have pastured a few of my stock over there. Mr. Poole never ordered me off; he know the stock was there and I asked him to bring them off, but he never did it. As to the kind of possession that was exercised over this island by myself, Green and Poole, was just as I stated before, they held the island by pasturing stock there; Poole in the latter part of his life mainly pastured in the winter time; Robert Green ran his stock summer and winter, now and then I had a stray animal that went over and stayed one winter, and I had a horse that I couldn't get off because no one would bring him off and I had to go after it myself, and that is all there is about

the possession of that island; up to a certain time Mr. Poole cut hay on the island, mainly if not entirely on the part that was west of what is known as his homestead on the main land."

(Cross-examination by Mr. KENWARD:)

"I have seen lots of the island, as a matter of fact I have been all over it, prospecting it all over, I was frequently down there, sometimes quite often, other times it goes for a month; I can't tell what times I have been on the island."

(Cross-examination by Mr. HAGA:)

"I knew Mr. Shell. He lived on the island I don't know how long, he was living there as I remember when I came to Payette, he left there some time I think from 1881 to 1884, I don't know exactly, Poole bought him out and he moved in. He had what we call a squatter's claim to the island, he had a cabin and lived there. He claimed it by right of possession. He didn't own any land on either side of the river. We prospected all over the island in 1893 just after the Chicago fair, in the winter and probably the next spring. Poole prospected also, he was with us. I don't know what constituted the Company. A man named Cammet and myself and an expert I got down there and Sam Poole; Green was not with us. That was after Sam Poole had proved up on his place, he had not received his patent then, but he may have proved up a year or so before. We organized a kind of company and located 240 acres on the island and extended into the river, that is what we recorded; that was Sam Poole and myself and associates; we had different names in it to fill up the number; we each had twenty acres. Sam Poole was one of these men. As to how long Poole and I continued to prospect, we simply located and recorded it, but never worked the assessment on it. We located the entire island,—240 acres. The locations were made after the Chicago fair during that winter and it might have been that we were on the Poole Island pretty well towards spring. We made the location, 1893 to 1894. When I say we didn't do the assessment work I mean the annual assessment work."

(Recross-examination by Mr. KENWARD:)

"We didn't work the assessment. By one not working his assessment it is equivalent to abandonment, of course.

(Defendant Greene's Exhibit 2 filed with clerk of Supreme Court as per stipulation of counsel.)

J. JESTER, being called as a witness for defendant Green, testified as follows:

(Direct examination by Mr. PAINE:)

"I am deputy assessor of Canyon County and as such have in my custody the assessment rolls and tax records of this county. Mr. Robert Green, the defendant, has paid the taxes on the S. E. ¼ of

the N. E. ¼ and Lots 1 and 2, Sec. 22, Twp. 9 N., R. 5 W., continuously from 1895 to 1907, inclusive. He has paid the taxes on that land for each and every year. The tax record shows the amount of land on which he paid taxes to be 99 acres."

(Cross-examination by Mr. KENWARD:)

"The record shows he paid taxes on 99 acres, never more than 99 acres. There is no record showing that that includes any land on any island. There is no record showing any taxes assessed against any island. The record does not say anything regarding an island. The record don't show any other taxes paid by Mr. Green."

It is stipulated and agreed by the attorneys for the respective parties, that the testimony offered by either party may be used by the other parties, in support of their case.

71 *Specifications of Error.*

The defendant, J. E. Scott, assigns and specifies the following grounds and particulars of error upon his motion for a new trial herein:

First. Insufficiency of the evidence to justify the findings, decision and judgment of the Court, and particularly in this:

(*a*) That there is not sufficient evidence to justify or sustain that portion of finding No. 1 of the Court wherein the Court finds that plaintiff is the owner of that portion of the island known as Poole Island which lies west of and opposite the meander line of the lots owned by plaintiff and between the said meander line and the middle of the main channel of Snake River, and the evidence submitted shows that said lots extend westerly only to the centre of the east channel of said Snake River, and that plaintiff has no interest whatever in said Poole Island.

(*b*) That there is no evidence to justify or sustain the finding of the Court that the defendant Robert Green is the owner of that portion of said island which lies west of and opposite the meander line of the fractional north half of Section 22, Twp. 9 N., R. 5 W., and between said line and the middle of Snake River, and the evidence submitted shows that said lots extend westerly only to the centre of the east channel of said Snake River, and that defendant Green has no interest whatever in said Poole Island.

(*c*) That there is no evidence to justify or sustain the finding of the Court that the defendant S. L. Sparks or the plaintiff
72 have now or ever had any right or title to that portion of Poole Island which lies opposite the fractional south half of Section 22, Twp. 9 N., R. 5 W., and between said line and the middle of Snake River, and the evidence submitted shows that said lots extend westerly only to the centre of the east channel of said Snake River, and that plaintiff has no interest whatever in said Poole Island.

(*d*) That there is no evidence to justify or sustain the finding of

the Court that the said land embraced in said island is not now and has not been part of the public domain of the United States since the Government parted with its title to the said lands of plaintiff, defendant Green and defendant Sparks, by its patents duly issued more than thirteen years ago, and the evidence submitted shows that the plaintiff nor the defendants Green and Sparks acquired no right, title or interest whatsoever in or to said island by reason of their said patents.

(*e*) That there is no evidence to justify or sustain the finding of the Court "that plaintiff and defendant Green were the owners and in the possession of said island at the time said defendant Scott went upon said island and occupied or claimed the same," and the said finding is contrary to law.

(*f*) That there is no evidence to justify or sustain the finding of the Court that the defendant Scott has no right, title, estate or interest in said island and that plaintiff and defendant Green are entitled to a decree quieting their title to said island, and en-
73 joining the said defendant Scott from setting up or asserting any claim or right thereto, and said finding is contrary to law and against the weight of the evidence.

Second. Errors in conclusion of law.

(*a*) The Court erred in its conclusions of law in holding and deciding that plaintiff was the owner of that portion of the island lying opposite his lots on the main land, and that plaintiff's title extended to the middle of the main channel of Snake River.

(*b*) The Court erred in its second conclusion of law in holding and deciding that plaintiff had acquired any interest whatever in that portion of Poole Island lying opposite the fractional south half of Section 22, Twp. 9 N., R. 5 W.

(*c*) The Court erred in its third conclusion of law in holding and deciding that the defendant Robert Green had any right, title or interest whatever to that portion of Poole Island lying opposite to the lots on the main land described in the pleadings herein, and in holding that the title of said Robert Green extended to the middle of the main channel of Snake River.

(*d*) The Court erred in its fourth conclusion of law in holding and deciding that the said Poole Island had not been a part of the public domain since the Government parted with its title to the lands of plaintiff and defendant Green and defendant Sparks described in the pleadings, and in holding and deciding that said Poole Island was not public land at the time of the commencement of this action.

74 (*e*) The Court erred in its sixth conclusion of law in holding and deciding that the defendant Scott had no right, title or interest in and to said Poole Island, and in holding that the defendant Green and plaintiff were entitled to a decree quieting their title thereto, and in giving said plaintiff and defendant judgment against the defendant Scott for costs of suit.

(*f*) The Court erred in its seventh conclusion of law in holding and deciding that no right was acquired by either the Government or the defendant Scott by the survey thereof, and in holding and de-

ciding that no right could be acquired therein except by purchase from plaintiff and defendant Green, and in holding and deciding that the Government of the United States had parted with all its right and title to said island to the defendant Sparks and Green and to the grantors of the plaintiff, and that the Government was estopped from claiming any interest in said island or from selling or offering to sell the same to the defendant Scott.

Third. That the decision of the Court is against law in that it holds and decides that the lands of plaintiff and the defendant Green and Sparks extend westerly to the centre of the main channel of Snake River instead of to the centre of the east channel of said river.

Fourth. Errors of law occurring at the trial and excepted to by defendant Scott.

The Court erred in refusing to admit in evidence defendant Scott's Exhibit No. 6, being a receipt given to said defendant
75 by the Receiver of the United States Land Office showing that said defendant had paid the necessary filing fees and entered the land embraced in said island as a homestead under the United States homestead laws.

The defendant Scott proposes the above and foregoing as his statement of the case upon motion for a new trial herein and prays that the same may be settled and allowed.

RICHARDS & HAGA,
Attorneys for Defendant Scott;
Residence, Boise, Idaho.

(Affidavit and acknowledgment of service shown on original.)
Filed April 19, 1909.

Order Allowing Statement.

(Title of Court and Cause.)

The above and foregoing statement is hereby settled and allowed as the statement of the case in this action, and the same contains so much of the testimony introduced in the above entitled cause, stated in narrative form, and documentary evidence as pertains to the specifications of error to such statement attached, and as is necessary or required in passing on and finally determining and deciding the questions raised by such specifications.

ED L. BRYAN, *Judge.*

Order and Statement as settled, filed April 19, 1909.

76 *Order Overruling Motion for New Trial.*

(Title of Court and Cause.)

The application and motion of the defendant John E. Scott for a new trial herein, came duly on for hearing on the 20th day of April,

1909, upon a statement of the case heretofore settled and allowed, and the Court now being fully advised of, in and concerning the same, orders that such application and motion be and the same are hereby denied and overruled, to which ruling of the Court counsel for defendant John E. Scott duly excepts.

ED L. BRYAN, *Judge.*

(Filed April 20, 1909.)

Notice of Appeal.

(Title of Court and Cause.)

To the said Plaintiff, C. P. Lattig, and to Ira W. Kenward, His Attorney of Record, and to the Defendant Robert Green, and to Karl Paine, His Attorney of Record, and to the Clerk of said Court:

You, and each of you, will please take notice that the defendant John E. Scott, in the above entitled cause, hereby appeals to the Supreme Court of the State of Idaho from the judgment made and entered in the above entitled cause in favor of the plaintiff C. P. Lattig and in favor of the defendant Robert Green, and against the defendant John E. Scott, on the 17th day of June, 1908, recorded in Judgment Book 3 of said Court at page 106, and from the whole thereof.

77 And you will further take notice that the said defendant John E. Scott, also appeals to the said Supreme Court from the order of the above entitled Court made in said cause and filed in the office of the Clerk of said Court on the 20th day of April, 1909, overruling and denying the motion for a new trial made in said cause by the defendant John E. Scott, and from the whole thereof.

RICHARDS & HAGA,
Attorneys for Defendant John E. Scott;
Residence, Boise, Idaho.

Service of the foregoing Notice of Appeal and receipt of copy thereof, admitted this 18th day of May, 1909.

IRA W. KENWARD,
Attorney for Plaintiff, C. P. Lattig,
Residing at Payette, Idaho.
KARL PAINE,
Attorney for Defendant Robert Green.

(Filed May 20, 1909.)

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated and agreed between the above named parties, that in all proceedings had and taken in the above entitled

cause from this date, either in the District Court or in the Supreme Court of the State of Idaho, it shall not be necessary to serve upon the administrator of the estate of S. L. Sparks, his representatives or successors in interest, or upon any of the other parties to this action except the plaintiff C. P. Lattig and the defendants
78 J. E. Scott and Robert Green, the statement of the case on motion for a new trial or bill of exceptions on appeal, or copies thereof, or the amendments thereto by either the said C. P. Lattig or Robert Green, or notice of appeal or any other notice of proceedings had or intended to be taken in said cause, and it shall only be necessary to serve papers or copies of papers or instruments filed in said cause from this date, upon the said C. P. Lattig, J. E. Scott and Robert Green, or their attorneys of record.

Dated this 26th day of June, 1908.

IRA W. KENWARD,
Attorney for Plaintiff, C. P. Lattig.
RICHARDS & HAGA,
Attorneys for Defendant J. E. Scott.
KARL PAINE,
Attorney for Defendant Robert Green.
DAVID C. CHASE,
Administrator of the Estate of S. L. Sparks.

Filed July 1, 1908.

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated between the respective counsel for the above named parties that all maps, plats and field notes of Government or other surveys introduced as evidence in the above entitled cause may be omitted from the printed transcript on appeal and need not be printed therein, and the original maps, plats and field
79 notes and all other documents introduced as exhibits or evidence during the trial of said cause may be transmitted to the Clerk of the Supreme Court and used on the appeal herein the same as if printed in the transcript.

Dated this 26th day of May, 1909.

IRA W. KENWARD,
Attorney for Plaintiff.
KARL PAINE,
Attorney for Defendant Robert Green.
RICHARDS & HAGA,
Attorneys for Defendant John E. Scott.

(Filed May 29, 1909.)

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated by and between the attorneys for the respective parties hereto, that the foregoing transcript contains full,

EXHIBITS NOT SUITABLE FOR MICRO-FILMING

true and correct copies of the judgment roll and of all instruments and papers constituting the same, motion for new trial, statement of the case on motion for a new trial, order allowing statement on motion for a new trial, order overruling motion for a new trial, notice of appeal in the above entitled cause, and that a good and sufficient undertaking on appeal from the judgment and from the order overruling the motion for a new trial was filed herein on the 22nd day of May, 1909, and we hereby certify that the said judgment roll, motion for a new trial, and statement of the case on motion for a new trial, and the exhibits therein referred to and
80 made a part thereof, and either printed in the foregoing transcript or filed with the Clerk of the Supreme Court in accordance with the stipulation filed herein (f —), all of which are of the records and files in this case, were submitted to the Judge of the said District Court and by him used on the hearing of the motion for a new trial herein, and the same constitute all the records, papers and files used or considered by said Judge on such hearing.

IRA W. KENWARD,
Attorney for Respondent C. P. Lattig.
KARL PAINE,
Attorney for Respondent Robert Green.
RICHARDS & HAGA,
Attorneys for Appellant John E. Scott.

(Here follows diagram marked page 80*a*.)

81 *Record Entries.*

BOISE, IDAHO, *December* 2, 1909.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present:

Hon. Isaac N. Sullivan, Chief Justice,
Hon. George H. Stewart, Justice,
Hon. James F. Ailshie, Justice,

and the officers of the court, when the following proceedings (among others) were had, to wit:

No. 1572.

C. P. LATTIG, Respondent,
vs.
JOHN E. SCOTT, Appellant, and ROBERT GREEN, Respondent.

This cause having been heretofore set for hearing, now on this day the same was called, O. O. Haga appearing for appellant, and Karl Paine and Ira W. Kenward appearing for respondents. After argument the cause was submitted and by the court ordered taken under advisement.

(Title of Court.)

82 No. 1572.

C. P. LATTIG, Respondent,
vs.
JOHN E. SCOTT, Appellant, and ROBERT GREEN, Respondent.

BOISE, IDAHO, *January* 11, 1910.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Ailshie to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Seventh Judicial District in and for the county of Canyon in the above entitled cause be and the same hereby is affirmed. Costs are awarded in favor of respondents.

(Title of Court.)

No. 1572.

C. P. LATTIG, Respondent,
vs.
JOHN E. SCOTT, Appellant, and ROBERT GREEN, Respondent.

BOISE, IDAHO, *February* 10, 1910.

83 A petition for rehearing having been heretofore filed on behalf of appellant in the above entitled cause, and the court having fully considered the same, now on this day the cause was again called, and it was ordered by the court that said petition for rehearing be and the same hereby is denied.

84 In the Supreme Court of the State of Idaho, November Term, 1909.

Filed Jan. 11, 1910. I. W. Hart, Clerk.

C. P. LATTIG, Respondent,
vs.
JOHN E. SCOTT, Appellant, and ROBERT GREEN, Respondent.

Riparian Rights—Common Law Rule of Title—Unsurveyed Islands—Plat of Survey Prima Facie Evidence—Government Bound by Survey and Plat—Title to Unsurveyed Islands.

1. The common law rule of riparian ownership has been adopted in Idaho, and under and by that rule a riparian proprietor on a fresh water stream, whether navigable or non-navigable, takes title to the thread of the stream.

2. As a general rule, the omission on the part of the government to take notice of an existing island or tract of land between the meander line along a stream of fresh water and the stream itself which it purports to meander, and the subsequent approval of a survey thereof and the plats of such survey, is to be taken as evidence that the island or strip of land beyond such meander line was intended to pass as a part of and incident to the surveyed abutting upland.

3. Ordinarily the government is bound by its own plats, and a patent issued referring to the official plats amounts to an adoption of such plats as a part of the description, and the natural monuments therein designated and shown are ordinarily controlling as to the true boundary line. The plat and field notes made from a survey of public lands which has been approved and adopted by the government showing fractional subdivisions along a meandered stream of fresh water, showing all the dry land as having been sur-
85 veyed and the balance of the legal subdivisions as covered by the waters of the stream, constitute prima facie evidence

that no island of which the government takes notice existed opposite such fractional subdivisions at the time the survey was made.

4. Where P. and G. purchased fractional subdivisions of the public domain meandering the Snake River and took title by patents issued in 1894 and 1895, respectively, for such tracts of land, and the description contained in such conveyances referred to an official survey made in 1868 and the plat thereof on file in the land office, held, that the patentees took title to the respective portions of an island extending along the course of the stream and between the meander line and the thread of the stream.

(*Syllabus by the Court.*)

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County.

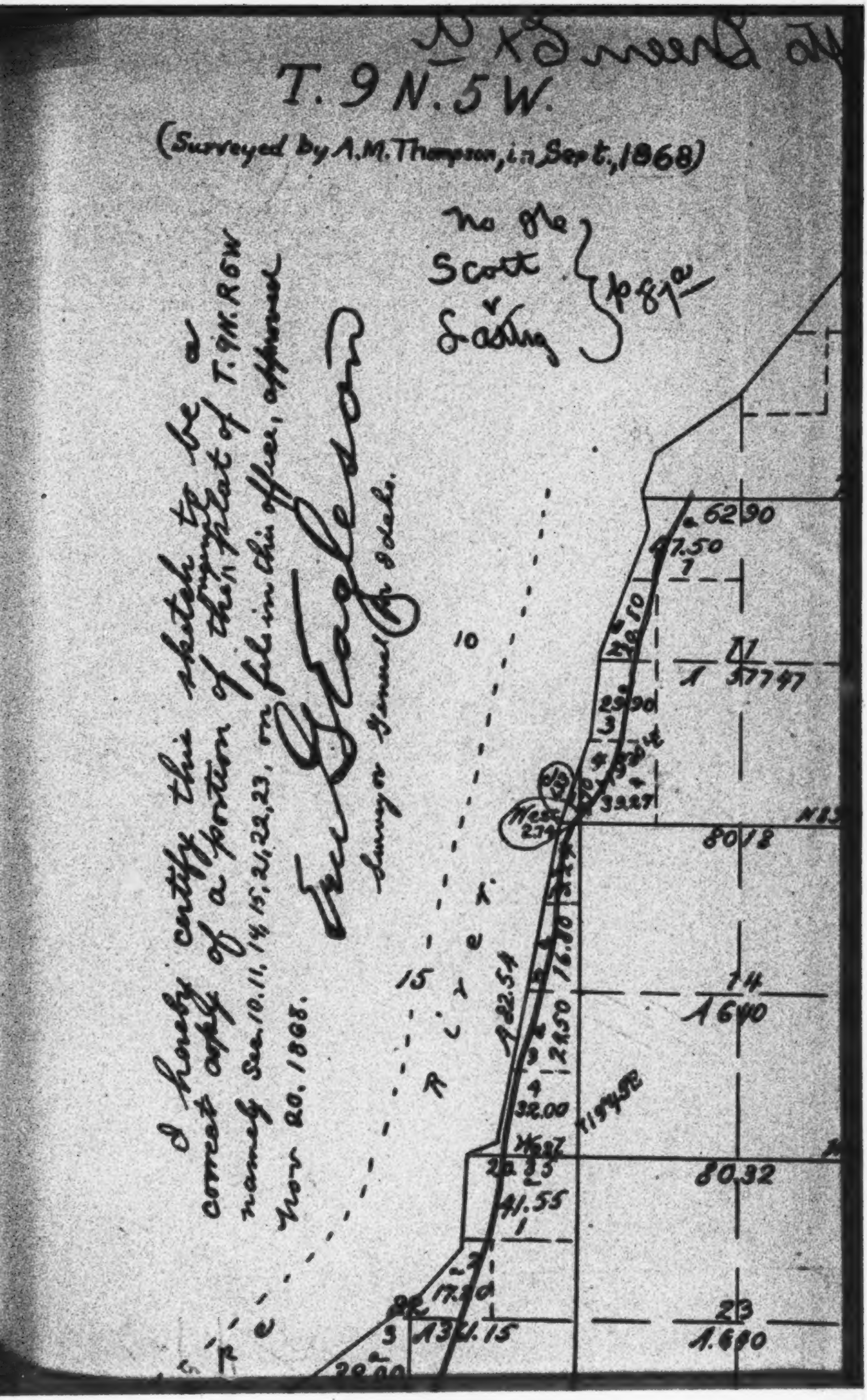
Hon. Ed. L. Bryan, Judge.

Action in ejectment. Judgment in favor of the plaintiff and the defendant Green, and against the defendant Scott. Defendant Scott appealed from the judgment and an order denying a motion for a new trial. Judgment affirmed.

Richards & Haga for appellant.
Ira W. Kenward for respondent Lattig.
Karl Paine for respondent Green.

86 This action was instituted by plaintiff to quiet his title to a tract of land commonly known by the designation of "Poole Island" in the Snake River. The plaintiff claimed a part of the island by reason of owning the upland which meandered the river, and claimed the balance of the island against the owner of the upland by reason of adverse possession. The defendant, Scott, who is appellant in this case, claimed that while the island was public unappropriated lands he entered upon the same, and that the title to the land is in the United States government, and that the plaintiff has no title or right of possession in or to the property.

The facts of the case are as follows: This land was surveyed under the order and direction of the commissioner of the general land office of the government in September, 1868. The field notes to sections 10, 15, and 22 of township 9 north, range 5 west, among other things show as follows: In the survey of the north boundary to sec. 22, the surveyor says: "Set a post with charred stake in mound of earth, with pits as per instructions for cor. to frac. secs. 15 and 22 on the right bank of Snake river." With reference to lines between secs. 10 and 15 the notes say: "Set post with charred stake in mound of earth with pits as per instructions for cor. to frac. secs. 10 and 15 on the right bank of Snake river." Again, with reference to the east boundary of sec. 10, he says: "Set post with charred stake in mound of earth with pits as per instructions for cor. to frac. secs. 10 and 11, on right bank of Snake river."



T. 9 N. 5 W.
(Surveyed by A. M. Thompson, in Sept., 1868)
Scott
I hereby certify this sketch to be a correct copy of a portion of the plat of T. 9N. R5W namely Sec. 10. 11. 14, 15, 21, 22, 23, on file in this office, approved Nov 20. 1868.
10
15
14
23

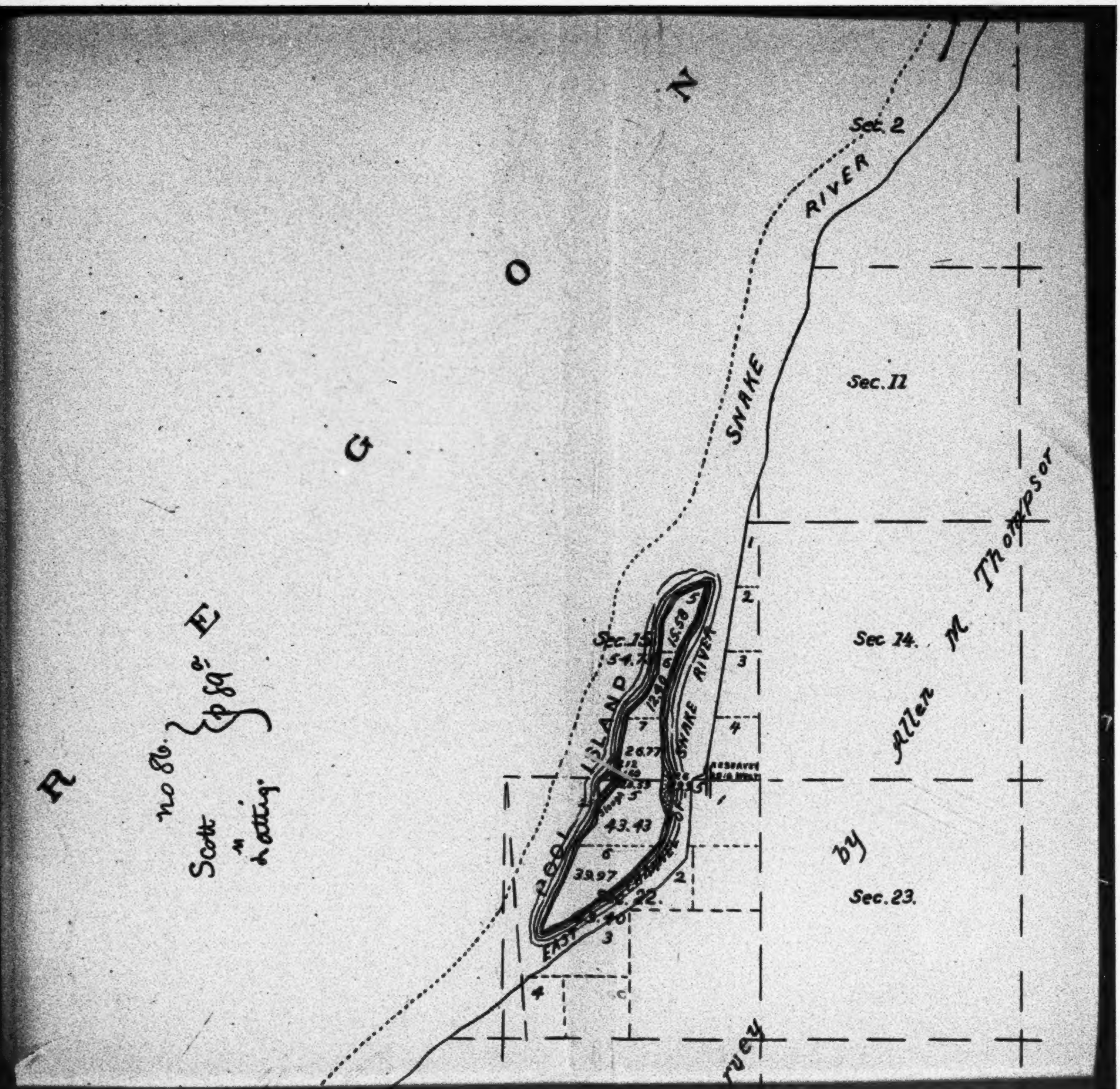
With reference to line between sections 21 and 22, he says: "Set post with charred stake in mound of earth with pits as per instructions for cor. to frac. secs. 21 and 22 on right bank of Snake river." This is followed by the notes of the meanders of the right bank of Snake river for sections 10, 15, and 22. Among other things
87 to be found in the "general description" to the township, it is said: "This township contains a fair proportion of rich bottom land situated on the Snake and Payette rivers." The following map is a copy of that portion of the plats returned and filed by the surveyor covering and including the land in question in this case, which is located in sections 15 and 22:

(Here follows map marked p. 87*a*.)

88 Some years prior to May 29, 1894, Samuel W. Poole made application under the Act of Congress of April 24, 1820, for the purchase of lots numbered 2, 3, and 4 in section 15, town. 9 N., range 5 W., and paid for 73.30 acres of land, and thereafter on the 29th day of May, 1894, the patent of the United States duly and regularly issued to Poole for the above described tracts. About one-half of the island in length lay opposite and directly west of these three fractional lots of land. Poole had been residing on the island since prior to 1883, and he and his successors, assigns, and grantees have ever since been in the possession and occupancy of the land, claiming the same. The plaintiff Lattig is the successor in interest by mesne conveyance from Poole, the original patentee. Some years prior to 1895, the respondent, Robert Green, entered and filed upon lots numbered 1 and 2, and the S. E. ¼ of the N. E. ¼ of Sec. 22, town. 9, under the Homestead Act of May 20, 1862; and in pursuance thereof and on the 4th day of February, 1895, a patent of the United States issued to Robert Green for the lands last above described. In each of these patents it was recited as a part of the description of the land that it was "according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general." The defendant Green appears to have likewise taken possession of that portion of the island which lay directly west of and opposite to the fractional subdivisions patented to him, and to have continuously used and occupied and claimed the same up to the time of the commencement of this action.

Some years prior to the commencement of this action the appellant, John E. Scott, entered upon this island as the employee of one of the owners of the upland, but thereafter asserted his rights as a settler on public domain and took steps with a
89 view to connecting his claim with the title of the United States to such lands. He made application to the general land office to have the island surveyed as a part of the public domain, and thereafter and in the month of March, 1906, the commissioner of the general land office ordered a survey of the island. Such proceedings were accordingly had that thereafter and about the month of June, 1906, a survey was made and the surveyor returned his field notes together with a plat showing the land surveyed. The portion of this plat covering the island and the lands in question is as follows:

(Here follows map marked p. 89a.)



O
G
E
R
N
Sec. 2
SNAKE
RIVER
Sec. 11
Sec. 14.
Sec. 23.
Sec. 15
ISLAND
SNAKE RIVER
EAST
by Allen M Thompsor
no 86
Scott

90 The case went to trial before the court without a jury, and the court made findings of fact as follows:

"This cause came on regularly for trial on the 9th day of July, 1907, before the court without a jury, a jury trial having been duly waived by the parties, at chambers, in the city of Payette, Idaho, by stipulation of counsel, I. W. Kenward, Esq., appearing as attorney for plaintiff, Richards & Haga, Esqs., for defendant J. E. Scott, and Karl Paine, Esq., for the defendant Robert Green, the defendants Bert Jakoaks, George T. Thebo, John Talbot, Charles Cravin, and S. L. Sparks not appearing by counsel or otherwise, and the court having heard all the evidence and proofs produced herein and duly considered the same, and being fully advised in the premises, and it appearing therefrom to the satisfaction of the court that the defendants, Bert Jakoaks, George T. Thebo, John Talbot, Charles Cravin and S. L. Sparks, were duly and regularly summoned to answer unto the plaintiff's complaint herein, and that each has made default in that behalf, and that the default of each for not appearing and answering unto plaintiff's complaint was duly and regularly entered herein, from the evidence introduced at the trial the court finds the facts as follows, to-wit:

1. That on the 2nd day of July, 1904, the plaintiff was and ever since has been, and his grantors were for many years prior thereto, the owners of and entitled to the possession of lots one, two, three and four of section fifteen, township nine north, range five west, Boise Meridian, situated in Canyon county, State of Idaho, and all of that portion of the island known as Poole Island which lies west of and opposite the meander line of said lots and between said meander line and the middle of the main channel of Snake river.

2. That the defendant Robert Green now is, and for more than thirteen years last past has been, the owner of, and in the
91 possession of, and entitled to the possession of all of the fractional north half of section twenty-two in Township nine north, Range five west, Boise Meridian, in Canyon county, Idaho, and of that portion of the island known as Poole Island which lies west of and opposite the meander line of said fractional north half, and between said meander line and the middle of the main channel of Snake river.

3. That at the time of the commencement of this action, and for ten years and more prior thereto, the defendant S. L. Sparks was the owner, in the possession of, and entitled to the possession of the fractional south half of section twenty-two, Township nine north, Range five west, Boise meridian, in Canyon county, Idaho, excepting however that portion thereof which lies west of and opposite the meander line of said fractional south half and east of the middle of the main channel of Snake river, known as part of Poole Island, and as to that part of Poole Island the court finds: That for the last twenty years immediately preceding the beginning of this action and continuously during said 20 years, the plaintiff and his grantors have claimed title to, have claimed and occupied, have been in possession of and controlled and managed, cultivated and improved the same land, and during all of said 20 years continu-

ously the plaintiff and his grantors have paid all the taxes, State, county, municipal or school, which have been levied and assessed upon the above described lands, according to law; and that no taxes have been levied thereon during said time, and that plaintiff is the owner thereof.

4. That at the point opposite the land and the whole thereof before described, Snake river is a navigable stream and the main channel thereof is west of said Poole island, and the center of said main channel forms the boundary line between the states of Oregon and Idaho, and said island lies east of the center of said main channel and within the state of Idaho.

92 5. That on the 16th, 18th and 19th days of June, 1906, upon application of defendant J. E. Scott, the government of the United States, through its land department and at the request of the commissioner of the general land office, caused the said Poole island to be surveyed at its own expense, which survey was proved and certified to by the surveyor general of the United States for the state of Idaho, on the 18th day of October, 1906, and accepted by the commissioner of the general land office on or about the 15th day of December, 1906, and the plat of such survey sent to the United States land office at Boise, Idaho, by said commissioner, to be filed in such office after notice, as is required by law and the rules of the land department for the filing of plats and authorizing the entry of public lands. And the register and receiver of the United States land office for Boise, Idaho, on the 20th day of May, 1907, did issue, post and publish the notice required by law and the rules of such department, wherein it was stated that the said plat of the survey of said island would be filed in said land office at Boise, Idaho, at 9 o'clock A. M. on the 8th day of July, 1907; that no protest or objection of any kind was made by the plaintiff or the defendant Robert Green against the making of said survey or against the application of this defendant for a survey of said island, and that due notice of defendant Scott's application for a survey of the said island was duly and regularly served on the defendant Robert Green, but the same was not served upon the plaintiff; that the defendant Robert Green was by said notice advised, notified and requested to file with the United States surveyor general for the state of Idaho, within thirty days from service thereof, his objections, if any he had, to the survey of said island, or to the application of defendant Scott for a survey thereof, but defendant Green wholly ignored the said notice, but informed the defendant Scott that he was the owner of that part of Poole island which lies west and opposite to his said land; that the said land em-

93 braced in said island and as shown by the plat and the survey made of said island and now on file in the office of the United States surveyor general in the general land office of the United States, consists of lots numbered five, six and seven of section fifteen, and lots numbered five and six of section twenty-two, township nine north, range five west, Boise Meridian, and contains 138.15 acres; that the said land embraced in said island is not now and has not been part of the public domain of the United States

since the government parted with its title to the said lands of plaintiff, defendant Scott and defendant Sparks by its patents duly issued more than thirteen years ago; that the defendant Scott has occupied and claimed said island for several years last past and prior to the commencement of this action; that he claimed and held and occupied the same and cultivated a part thereof, under the provisions of Chapter 4, Title 10 of the Code of Civil Procedure of the Revised Statutes of Idaho of 1887, and with the intention to enter, file upon and claim the said island as a homestead under the public land laws of the United States as soon as the same was surveyed and subject to entry; that plaintiff and defendant Green were the owners and in the possession of said island at the time that defendant Scott went upon said island and occupied or claimed the same.

6. That for a long time prior to the commencement of this action the defendant Scott was and still is claiming an interest in and to said island adverse to the plaintiff and the defendant Green; that he has no right, title, estate or interest in or to said island or to any part thereof, and that plaintiff and defendant Green are entitled to a decree quieting their title to said island and enjoining the defendant Scott from setting up or asserting or claiming any right, title or interest therein."

94 Conclusions of law were drawn accordingly and decree was entered in favor of plaintiff Lattig, holding that he was the owner of that portion of the island lying directly west of and within the lines of the fractional subdivisions owned by him meandering the Snake River, and likewise in favor of the defendant Green, holding that he was the owner of that portion of the island lying directly west of and within the side lines and the fractional subdivisions owned by him and meandering the river. The defendant Scott has appealed from the judgment and order denying his motion for a new trial.

AILSHIE, *J.* (after stating the facts):

The only question to be determined in this case is this: Did the United States convey this island to its grantees, Poole and Green, by the patents issued to them in 1894 and 1895? In answering this question there are some well recognized rules it will be necessary to observe. It has been repeatedly held by the supreme court of the United States and is now the settled law of the land that the "grants by the United States of its public land bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies." (Grand Rapids & Ind. R. Co. v. Butler, 159 U. S. 91, 40 L. Ed. 87; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428; Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112.) This rule was adopted and quoted with approval in Whitaker v. McBride, 197 U. S. 510, to the same effect. As said by the court in St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941, "The question as to whether the fee * * * extends to the middle thread of the stream or only to the water's edge is a question in regard to a rule of prop-

erty which is governed by the local law. * * *" (Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254, 35 L. Ed. 1010.)

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In view of this well established rule of law, we must construe these grants from the government, and their effect with reference to the boundary line along this stream, in the light of the decisions and rule of law in this state. After a very careful and full consideration of the question as to the rights of a riparian proprietor in this state, this court held in Johnson v. Johnson, 14 Ida. 561, 95 Pac. 499, as follows: "A riparian owner upon the streams of this state, both navigable and non-navigable, takes to the thread of the stream, subject however to an easement for the use of the public." There are no tide waters in this state; all our waters are fresh waters, unaffected by the ebb and flow of the tide. We therefore have no navigable streams in Idaho as viewed by the rule of the common law. We have consequently adopted the common law doctrine that has been uniformly applied everywhere the common law prevails on the subject; that is, whether a fresh water stream be navigable or non-navigable in fact, the riparian proprietor takes title ad filium aquæ.

It is also equally well settled that a meander line run in conformity to the United States statute in surveying public lands bordering on a navigable stream is not a line of boundary but is intended only to designate and point out the sinuosity of the bank of the stream and as a means of ascertaining the quantity of land in the fractional subdivisions to be paid for by the purchaser, and that the real and true monument in such case is the water course and not the meander line. (Johnson v. Hurst, 10 Ida. 308; Johnson v. Johnson, 14 Ida. 561, Horne v. Smith, 159 U. S. 40, 40 L. Ed. 68; St. P. & P. R. Co. v. Schurmeier, 74 U. S. 272, 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428; Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. Ed. 872.) Under the decisions of this court in Johnson v. Hurst, and Johnson v. Johnson, supra, and numerous decisions from the supreme court of the United States, as well as the courts of the various states, there could be no doubt, we think, but that it would be our duty to hold that the land comprising this island belongs to the abutting upland owners if in fact no body of water intervened between the meander line and this tract of land. As said by the supreme court in Whitaker v. McBride, a case in which the court awarded an island of 22 acres to the riparian proprietor, "If there were no islands in this case, it would not under these authorities be questioned that the title of the riparian owners extended to the center of the channel. How far does the fact that there is this unsurveyed island in the river abridge the scope of the rule?"

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It should be observed at this juncture that Poole island is 8600 feet long, extending in a northerly direction along the course of the river. Its average width is apparently about 700 feet. Opposite the lands of respondent Lattig it is something less than 700 feet wide, while opposite the lands of respondent Green it varies from some 500 to over 1200 feet in width. It is conceded that the Snake

river proper flows along the west side of this island, and that the navigable stream, forming at this point the dividing line between Idaho and Oregon, is the stream as it flows northerly in front of these lands and along the west side of the island. Indeed, if any controversy could arise as to the real dividing line between the two states that would be readily settled in favor of the main channel on the west side of this island under the rule announced in Iowa v. Illinois, 147 U. S. 1, 37 L. Ed. 55.

The real difficulty which has been injected into this case seems to grow out of the fact that there is a slough or high water channel flowing from the Snake river at the upper end of this island
97 for a distance of about one mile and a half and thence returning to the main stream and separating the island from the main land. This, it is conceded, is non-navigable except in times of high water. There is some difference among the witnesses as to the volume of water flowing in this slough or high water channel during the ordinary and low water season, but we think it is reasonably well established that it is very shallow at the upper end of the island, and at the intake to the slough or channel and in the upper portion thereof it does not exceed a foot in depth. Lower down the channel there seem to be some deeper places.

Plaintiff's exhibit "D" is a very comprehensive and instructive map and plat of these fractional lots, Poole island, and the entire river opposite the same, and was made from a survey had on December 5, 1905, and some six months prior to the government taking notice of and ordering a survey of the island. This survey was made by Mr. D. A. Utter, the present surveyor general of this state, and prior to his appointment to the office he now holds. It shows the main channel of the river on the west side of the island of an average width of 1,000 feet. He designates the channel on the east side as a "slough." This seems to vary in width from 240 feet near the lower end to 385 feet at the upper end. It also shows the meander line on the right bank of the slough, as established by the 1868 survey, running very close, in most places, to the water line. The river has a fall of 6 feet from the upper end to the lower end of the island. This map shows a slough cutting into the island from the west side. We recite these additional facts in passing in order to give as fully as possible the situation and condition upon which we rest this opinion. We are at once confronted with two lines of authorities from the supreme court of the United States. On the one hand are Horne v. Smith, 159 U. S. 40, 40 L.
98 Ed. 68; Niles v. Cedar Point Club, 175 U. S., 300, 44 L. Ed. 171; French-Glenn Livestock Co. v. Springer, 185 U. S. 47, 46 L. Ed. 800; Security Land & E. Co. v. Burns, 193 U. S. 167, 48 L. Ed. 662; and a number of state decisions to the same effect. We can most accurately state the holding of the first three of those cases by quoting from a summary made by Mr. Justice Brewer in Whitaker v. McBride, 197 U. S. 510. In referring to the foregoing case he said:

"In the first of those cases it appeared that the survey stopped at a bayou, and did not extend to the main channel of the Indian

river, a mile distant; and we held that the line of that bayou must be considered as the boundary of the grant; that it could not be extended over the unsurveyed land between the bayou and the main channel of the Indian river; that it was a case of an omission from the survey of land that ought to have been surveyed, and that such omission did not operate to transfer unsurveyed land to the patentee of the surveyed land bordering on the bayou. In the second we held that, as the survey showed a meander line bordering on a tract of swamp or marsh lands, the grant by patent terminated at the meander line, and did not carry the swamp lands lying between it and the shores of Lake Erie. In the third, it appeared that there was no body of water in front of the meandered line, and we held that that line must, therefore, be the limit of the grant, and the fact that outside the side lines extended there was a body of water did not operate to extend the grant into any portion of that body of water."

The other cases are similar in facts and principle to those just reviewed.

On the other hand, there is a line of more numerous decisions from the same court holding that when the government has surveyed its lands along the bank of a river and has sold and
99 conveyed the uplands by government patent and by legal subdivisions the patent conveys the title to all the land lying between such meander line and the high water mark or low water mark or thread of the stream, as the rule may prevail in the state where the lands are situated, and that if in a state where the riparian proprietor takes to the thread of the stream, he takes all such islands as lie on his side of the middle of the stream. (Grand Rapids etc. R. R. Co. v. Butler, 159 U. S. 88, 40 L. Ed. 85; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428; Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 442; Whitaker v. McBride, 197 U. S. 510, 49 L. Ed. 857.)

The question, therefore, confronting us is to discover if possible the distinguishing feature or circumstance between these two lines of authority, and ascertain the class to which the present case belongs.

In Security Land & E. Co. v. Burns, 193 U. S. 167, 48 L. Ed. 662, the court followed the first line of authorities above mentioned and rested its decision specifically on the authority of French-Glenn Livestock Co. v. Springer, supra. That was a case where the lands claimed lay between the meander line of the patentee's lands and a lake, and the unsurveyed body of land was about 1,000 acres. The court, in passing on the case and determining the class to which it should properly belong and the rule by which it should be decided, felt called upon to give some of the reasons, facts and circumstances that influenced the court to refuse the patentee of the fractional lots the right to project his lines to the lake. We quote from the opinion some of the reasons that the court sets forth as decisive points on which the opinion turns. The court says:

"There was, in truth, no such survey as was called for by the contract between the government and the surveyor. The exterior

lines, with the exception of the south line of the township, were run, but no survey of the interior of the township was ever
100 made and no section lines thereof were ever run, with one possible exception, and in truth the survey as a whole was a fraud. No such body of water at the place indicated on the plat of survey then existed or now exists. On the contrary, the lake is from half a mile to a mile away from what is called its meander line on the plat of the survey filed by the surveyor. * * * The surveyor never was on the ground and never saw the lake he pretended to measure, and the lake never existed where he laid it down in his fraudulent survey. If the side lines of the various lots were protracted in their course, those of lot 3 would never reach the lake, and those of lots 5 and 6 would not reach the lake within the limits of section 4, while the south line of lot 7 would touch the lake, and a few feet of frontage would then be secured, and that lot would then have 139 instead of 25.25 acres. The side lines of lots 5, 6, and 7, if protracted, would instantly cross the protracted side lines of lot 3. There are at least 1,000 acres of high tillable land between the actual water line of the lake and the meander line as returned by the field notes and the plat of survey, and the land is covered by trees of more than a century's growth and growing down to the water's edge. In order to bound on the lake the lots would exhibit a totally different form from that which they take on the plat of survey and such boundary would violate every rule of statutory survey, by conveying lands not conforming to the system adopted by the government, and carried out every since its adoption."

And, again, the learned justice in the course of the same opinion reiterates the reasons for the holding in this language:

"The fraudulent character of the survey, the nonexistence of the lake within at least half a mile of the point indicated on the
101 plat, the excessive amount of land claimed as compared with that which was described and stated in the patents and actually purchased and paid for, the difficulty in reaching the lake at all, and the necessity, in order to do it, of going outside of section 4 (with the exception as to a small part of lot 7), the section in which the description and plat placed all the land, all go to show that the lake ought not to be regarded as a natural monument within the cases, or within the principle upon which the rule is founded, and therefore the courses and distances by which the amount of land actually purchased and paid for was determined, ought to prevail."

And again says the court: "When the plat itself is the result of a gross fraud, and indeed is entirely founded upon it, the reason for refusing to recognize the lake as a boundary becomes apparent."

In the French-Glenn Livestock case, Mr. Justice Shiras in the course of the opinion gave substantially the same reasons for confining the patentee to the meander line instead of allowing him to go to the waters of Malheur Lake.

Horne v. Smith was a bayou case, and the court limited the patentee's grant to the waters of the bayou, and in giving the reasons for doing so said:

"In the first place, the area of the lots is given, and when that area is stated to be 170 acres, it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the
102 east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27.

These considerations are conclusive that the water line which was surveyed, and made the boundary of the lots, was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and between it and the main body of the Indian river."

Ordinarily the government is bound by its own plats, and a patent issued referring to the official plats amounts to an adoption of such plats as a part of the description, and the natural monuments therein designated and shown are ordinarily controlling as to the boundary line.

In Grand Rapids & Ind. R. Co. v. Butler, 159 U. S. 88, the court, speaking through Mr. Chief Justice Fuller and treating of the necessity for reserving any right not intended to be granted, said:

"We entirely concur in the result reached by the state court that there was no such reservation, and in its findings as follows: 'In the present case there is no act on the part of the government showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey. It was not surveyed until about twenty-five years after the survey of 1831, and not till nearly twenty years after the survey of 1837, when the other islands and the lands upon the west bank were surveyed, thus com-
103 pleting the survey in that region.'"

In further considering the questions involved in the foregoing case, the Chief Justice quoted with approval from the opinion of the court in Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112, as follows:

"Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass, then, by a grant bounded by a stream of water? At common law, this depended upon the character of the stream or water. If it were a navigable stream or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the center thread of the current. * * * At common

law, only arms of the sea and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership of the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. And this latter, Chancellor Kent says, bears a perfect resemblance to public highways. The consequence of this doctrine is, that all grants bounded upon a river not navigable by common law, entitled the grantee to all islands lying between the main land and the center thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government
104 has done some act to qualify or exclude the right * * * The United States have not repealed the common law as to the interpretation of their own grants, nor explain what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant."

Middleton v. Pritchard has been so repeatedly cited and quoted from with approval by the highest court of the land that we feel justified in accepting it as sound law.

In Jefferis v. East Omaha Land Co., the court in speaking of the presumptions that must arise from the descriptions and calls of the plat and of the plat itself, says:

"It is a familiar rule of law that, where a plat is referred to in a deed as containing a descripton of land, the courses, distances and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed * * * In the present case the plat was made in accordance with the Statute, showing the river as the northern boundary of fractional section 21 and of lot 4 therein; and as the patent referred to the official plat of the survey, and thus made that a part of the description of lot 4, that description made the river the boundary of lot 4 on the north. * * * These views result in the conclusion that the side lines of lot 4 are to be extended to the river, not as the river ran at the time of the survey in 1851 but as it
105 ran at the date of the patent in 1855, and that all the land which existed at the latter date, between the side lines so extended and between the line of the lot on the south and the river on the north, was conveyed by the patent."

In Mitchell v. Smale, the patentee paid for a fractional lot of 4½ acres within the meander line, and the supreme court held that the patent included an unsurveyed point or tongue of high land running beyond the meander line and down into the adjoining lake containing 25 acres; and that the government by survey made subsequent

to the issuance of patent could not reconvey this 25 acres between the Meander line and the lake. In considering this, the court said:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. * * * The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

In St. Clair County v. Lovingston, 90 U. S. 46, 23 L. Ed. 59, Mr. Justice Swayne speaking for the court, said: "Where a survey and patent showing a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such
106 tract." (Brown v. Huger, 62 U. S. 305, 16 L. Ed. 125; Franzini v. Layland, 97 N. W. 499.)

It will be at once observed that the first line of authorities above cited consists chiefly of marsh, bayou, slough and lake cases. On the contrary, the distinctly river cases, from states holding to the common law rule as to the vesting of title in the riparian proprietor to the thread of the stream, almost, if not entirely without exception, hold that the grantee from the government takes not only any margin of land between the meander line and the water but also such unsurveyed islands as lie on his side of the middle of the stream.

The government in ordering the survey of public lands issues certain instructions to its surveyors. After the survey is made and the plat and field notes are returned to the land office, an inspector appointed by the government is sent to examine the survey in detail and report thereon to the government. This is done for the purpose of checking up the work of the surveyor and verifying the same, and ascertaining if he has complied with the law and the terms of his contract. After the report of such inspector goes in the government either approves or rejects the survey and the notes and plats thereof. After these things have been done it is quite generally held, as can be seen from the foregoing authorities, that the omission on the part of the government to take notice of an existing island or tract of land between a meander line and the stream it purports to meander, and the subsequent approval of the survey, is to be taken as evidence that the island or strip of land beyond the meander line was intended to pass as a part of and incident to the upland it abuts. It has even been intimated in some of the decisions and positively asserted in others that "Such evidence is conclusive in the absence of a judicial determination in favor of the govern-
107 ment relieving it from mistake upon the same grounds that a private party might be relieved under the same or similar

circumstances. (Franzini v. Layland, 97 N. W. 503; Murphy v. Kirwan, 103 Fed. 104; Moore v. Robbins, 96 U. S. 530; 24 L. Ed. 848.)

Now as we gather from the rulings and comments of the court running throughout the different cases on both sides of this question, we arrive at the conclusion that the court will only permit the government to intervene and survey land lying between the meander line and the river, or other body of water, in cases where the survey has been made prior to the sale or disposal of the fractional subdivisions or abutting land by the government, or in cases where the body of land is so large and so situated that no other reasonable inference can be drawn than that it was not the purpose and intention of the surveyor to survey the entire tract or of the government to part with title to the entire tract, and that the physical conditions and surroundings facts are so clear and patent that the purchaser could not help but know that he was not purchasing so large a body of land when buying a small fractional subdivision adjoining the unsurveyed tract. This seems to be also true in cases of palpable fraud on the part of the surveyor. It is only where the physical facts and circumstances rebut the legal presumption that the government intended to part with title to the land in question that the court will recognize a further conveyance. In the light of these conclusions and of the foregoing authorities, we may well recount some of the undisputed facts of this case and natural inferences deducible therefrom.

In the first place, there is no pretense made that the survey of 1868 was fraudulent, nor is it contended or intimated that the surveyor who made that survey violated his instructions in any respect or acted wrongfully or fraudulently. In the absence of a showing to the contrary, "it will be presumed," says the supreme court of Minnesota, "that the surveyor did his duty, and
108 meandered the shore line as it then existed." (Sherwin v. Bitzer, 97 Minn. 254.) Neither is there any showing that the island in fact existed at the time the survey of 1868 was made. Under the rules of evidence recognized by this and all other courts so far as we are advised, it must be accepted as an established fact in this case that Poole island did not exist at the time of the survey of 1868. The plat and field notes show all the land to have been surveyed and that all the intervening surface was covered by the waters of Snake river. This plat and the field notes were made by the direction of the government, the owner of the land, and were approved by the government and constitute prima facie evidence of the matters and facts therein designated and recited. That being true, a prima facie case has been made to the effect that no island existed at the time of the survey in 1868. It may in fact have been there, and yet not have been at that time the size that the government required surveyed; or it may have been nothing more than a strip of sand or gravel bar extending along the course of the river and considered of no importance or value. It might have easily formed in a few years as it is only slightly more than a mile below the mouth of the Payette river which empties into the Snake on the

Idaho side. What was said by Mr. Justice Brewer in Whitaker v. McBride in speaking of some islands in the Platte river is very applicable in this case. He said: "Possibly they may have been regarded as having no stability as tracts of land, but as like sand bars which are frequently found in western waters and are of temporary duration, existing today and gone tomorrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyor." It is contended, however, by the appellant that this island did exist at the time of the admission of the state into the Union, and that the test should be applied as of that date.

109 It does not seem to us that such inquiry becomes an important question here. Under the rule of law prevailing in this state, the state does not take title to the bed of the stream and it does not claim title to this island. United States v. Mission Rock Co., 189 U. S. 391, 47 L. Ed. 865, cited by appellant, was a tide land case between the government and the grantee of the state and involved the application of a different principle from that arising in the case at bar. The government never pretended to assert any claim to the island in question for sixteen years after the admission of the state into the Union and then only upon the application of one who had squatted on the land. In fact, it had patented these fractional subdivisions to Poole and Green eleven and twelve years, respectively, prior to ever asserting any right to the island or ordering a survey thereof. The patentees and their grantees had been in the actual, open and notorious possession of this island for at least twice the period necessary to constitute the bar of the statute of limitations under the laws of this state, and, while we recognize that the statute of limitations cannot be invoked against the government, yet it is a circumstance to be considered when we remember that the government had parted with its title to the upland and had let the grantees into the possession of the premises and had acquiesced for so long a period of time in the patentee's possession and claim of ownership and had permitted him to improve and cultivate the same, under the assumption that he had acquired title thereto through his patent to the uplands. Poole resided on this island as early as 1883 and was living there, it seems, when he made proof on and secured title to lots 2, 3, and 4 adjacent to the island on the east.

Another thing that is worthy of note is the fact that the whole of the island, with the possible exception of a couple of acres at the upper or southern end of the island, is included within the

110 sections (15 and 22) in which the fractional subdivisions are located that were patented to Green and to Lattig's predecessor in interest. The plats returned to the land office showed all this land as having been surveyed and that the unsurveyed portion was a part of the river. It is also significant that in the order of the department directing a survey of "Poole Island," they say that it is located in "Snake river, situated in sections 15 and 22, T. 9 N., R. 5 W. Idaho." The department was, therefore, ordering the survey of the identical sections that had already been surveyed and returned to the general land office; and the government had parted

with all of its title to those identical sections. This is, therefore, not a case where the owners of the uplands are bound by the action of the Department of the Interior. If that action had been taken prior to the issuance of their patents, then it must be conceded, we think, that they would have been bound; but at the time the government asserted its claim to this island by ordering it surveyed in 1906, and the survey was made on the application of a mere squatter, it had nothing to survey. It had conveyed all of its interest in this land to Poole and Green, and its action was without and beyond its jurisdiction and could in no way bind or affect the owners of these lands. (Hardin v. Jordan, supra; Davis v. Wribbold, 140 U. S. 238; Moore v. Robbins, 96 U. S. 530; 24 L. Ed. 848; Noble v. Union River L. R. Co. 147 U. S. 174; 37 L. Ed. 123.) There is nothing in connection with the facts and circumstances of the size of Poole island that would either suggest or indicate fraud on the part of the surveyor or would negative the prima facie presumption that the government intended that the island should go to the purchasers of the adjoining upland. Poole paid for 73.3 acres, and the portion of this island lying between the meander of the fractional subdivisions purchased and the thread of the
111 stream is 54.75 acres according to the survey of 1906. Green paid for 98.75 acres, and the portion of the island to which he would be entitled amounts to 83.40 according to the 1906 survey. It will thus be seen that in each case the land within the meander lines and actually paid for is in excess of the amount to which each would be entitled by reason of his riparian rights.

We have confined ourselves in this case almost exclusively to a consideration of decisions from the supreme court of the United States to the exclusion of cases from the state courts, for the reason that this case involves a federal question. As we read and understand the decisions from that court, we are convinced of the correctness of our conclusion in this case. This is not the first time a similar question has arisen in this state. The facts of the case of Johnson v. Johnson involved a somewhat similar question, as did also the case of Johnson v. Hurst. In view of the fact that Snake river flows through Idaho and constitutes the boundary line between the state of Idaho and the states of Oregon and Washington on the west for a sweep of some 600 miles, and that within that distance there is a large number of islands of varying sizes on the Idaho side of the thread of the stream, this question must necessarily recur from time to time, and it is essential that the rule of law be established with reference to the title to those islands. The lands abutting on this stream have been acquired by pioneer settlers and homesteaders in good faith and they have, as a general rule, taken possession of and occupied these islands and gravel and sand bars and put them to such use as they could make of them, and if at this late date the government is from time to time to order those islands surveyed and issue patents upon the application of "prowling squatters" (Murphy v. Kirwan, 103 Fed. 109; Lamprey v. State, 52
112 Minn. 197, 53 N. W. 1142, 18 L. R. A. 677), the situation will become lamentable and exceedingly prejudicial and bur-

densome to steelers and bona fide homebuilders. We can not give our sanction to such a procedure.

We conclude that the patentees to the abutting upland fractional subdivisions took title to the middle or thread of the navigable channel of Snake river, and that the judgment of the trial court should accordingly be affirmed with costs in favor of respondents.

Stewart, J., concurs.

Sullivan, C. J., dissents.

113 SULLIVAN, *C. J.* (dissenting):

I am unable to concur in the conclusion reached by my associates. My views on some of the questions involved are quite fully set forth in my dissenting opinion in the case of Johnson v. Johnson, 14 Ida. 561. In the case at bar there is involved an island that is not the bed of the stream, containing about 138 acres of dry land that does not overflow and has been surveyed by the Land Department of the U. S. Government. I think the correct doctrine is announced by the Supreme Court of the United States in Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331. It is there held that the grants by Congress of portions of the public lands to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force no title or right below high-water mark to the purchaser. Under the decisions of the Supreme Court of the United States, the title to a bed of a navigable stream remains in the United States until the territory in which the same is located is admitted as a state into the Union and then it goes to the state; but islands in navigable rivers are not thus transferred to the state but remain a part of the public domain of the United States and subject to survey and sale under the laws of Congress and the rules and regulations of the Land Department of the government.

In Kirwin v. Murphy, 189 U. S. 35, 47 L. ed. 698, the court, speaking through Chief Justice Fuller, said:

"The administration of the public lands is vested in the Land Department, and its power in that regard cannot be devested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. (Citing authorities.) The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the Government, and the Land Department, charged with the duty of surveying the public
114 domain, must primarily determine what are public lands subject to survey and disposal under the public land laws."

In the case at bar, that Department has decided that said island was public land by ordering it surveyed.

In Niles v. Cedar Point Club, 175 U. S. 300, 44 L. *3*d. 171, where it was contended that there was wonderful magic in a meander line and entitled the purchaser to a fraction bordered by a meander line to all of the land between it and the thread of the stream, the court, speaking through Justice Brewer, said:

"There is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land,

and beyond that boundary there may be found forest or prairie, land or water, government or Indian Reservation."

In the case at bar, respondents claim title under patents from the government which describe certain fractional lots bordered by a meander line and which patents designate the acreage purchased from the government by the different patentees and my associates hold that by reason of the purchase of said fractional lots, the purchasers are entitled to all of the land between the meander line and the thread of the stream in each respective grant, including said island containing more than 138 acres of land that does not overflow. I cannot consent to that conclusion.

In Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, a case very much like the one under consideration, Mr. Justice Brewer said:

"Alhtoug.. it was unsurveyed, it does not follow that a patent for the surveyed tract adjoining carries with it the land which,
115 perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."

This island was public land of the United States, and the Land Department of the government was authorized to proceed whenever it may think best to do so, and survey it as a part of the public lands, which it has done.

In the case of Gowdy v. Gilbert, 19 Land Decisions, p. 17, the Secretary of the Interior had before him the same question as is involved in this case, and it was held to the effect that a final decision of the Department directing the survey of a tract of public land precludes the subsequent consideration of a claim thereto based on a riparian ownership. And in the consideration of the application of Kuhlman, 27 Land Dec., 68, for the survey of an island, it was held that an application for the survey of an island in a meandered and non-navigable river may be allowed where it is apparent that the said island was improperly omitted from the official survey. In that case the island embraced about 100 acres and the Secretary of the Interior held, as has been held in other cases, that such a large acreage was in itself evidence that the island had been improperly omitted from the original survey.

In the case of Johnson v. Hurst, 10 Ida. 308, this court had under consideration the title to a small island and the court said:

"The government has never complained of any fraud having been practiced or any mistake having been made. It has never ordered a re-survey nor an additional survey and has never been heard to complain of the claims of the plaintiff."

In the case at bar, the government has ordered and made a survey of the island in dispute.

116 In Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, the court had under consideration a question very much like the one at bar, and said:

"Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are the owners

of the bed of a stream to the center of the channel; that the government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream, and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purpose of homestead or pre-emption entry. In such a case the rights of the riparian proprietors are to be preferred to the claims of the settler."

There the Supreme Court of the United States directly holds that the government, as original proprietor, has the right to survey and sell any land including islands in the rivers or other bodies of water and if it omits to survey an island in a stream and refuses to do so when its attention is called to the matter, then the rights of the riparian proprietor are to be preferred to the claims of the settler. But in the case at bar, when the government's attention was called to the fact that this large island had not been surveyed, the Department at once directed its survey, as it had a right to do. Neither the state nor the riparian owners took title to the beds of the stream nor to the islands, at least prior to the admission of Idaho as a state, and then not to the islands. See Granger v. Swart, Fed. Cases No. 5,685.

In 1 Farnham on Waters, p. 50, the author states the rule to be as follows:

117 "Islands formed in the stream before the admission of the state into the Union are subject to disposal by the Federal Government the same as other public lands. If they are formed after the admission of the state, the question whether they belong to the riparian owner, or are the property of the state, is governed by local law."

The record clearly shows that this island was in existence at the time Idaho was admitted into the Union of States and long before and was occupied as early as 1881.

The judgment ought to be reversed.

118 No. —.

In the Supreme Court of the State of Idaho, February Term, 1910.

C. P. LATTIG, Plaintiff and Respondent,

vs.

JOHN E. SCOTT, Defendant and Appellant, and ROBERT GREEN, Defendant and Respondent.

Petition for Rehearing.

Appeal from District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County.

Ira W. Kenward, Attorney for Respondent C. P. Lattig.
Karl Paine, Attorney for Respondent Robert Green.
Richards & Haga, Attorneys for Appellant.

Filed Jan. 31, 1910.

I. W. HART, *Clerk.*

119 In the Supreme Court of the State of Idaho.

C. P. LATTIG, Respondent,
vs.
JOHN E. SCOTT, Appellant, and ROBERT GREEN, Respondent.

Petition for Rehearing.

To the Honorable Supreme Court of the State of Idaho:

Your Petitioner, John E. Scott, Appellant in the above entitled cause, respectfully represents that a rehearing should be granted in said cause, for the reasons hereinafter set forth:

We are firmly convinced, from a reading of the majority opinion filed in this cause, that a majority of this Court was acting under a misapprehension both of the facts and the legal principles applicable to the particular facts as we find them in this case.

On page 495 of the opinion the Court says, "Some years prior to the commencement of this action the Appellant John E. Scott entered upon this island as the employee of one of the owners
120 of the upland." This statement of the facts is entirely at variance with the record. The testimony was conclusive and we think uncontradicted that John E. Scott went upon the island solely and exclusively for the purpose of taking possession of it as part of the unsurveyed public domain. It is true that after he had established his residence on the island he assisted Mr. Thebo a few times in feeding his cattle. Mr. Thebo, however, had simply purchased the hay on the island and had taken his cattle over there for the purpose of feeding the hay, and when he went off the island he arranged with Mr. Scott to look after the cattle. But this was after Mr. Scott had established his residence on the island. We do not think that the fact contained in the statement above quoted was at all material in the determination of the case, but it contains an imputation against Scott which we think is unjust to him and might operate against him in future proceedings in this cause. We hope, therefore, that the Court will correct the statement.

On page 503 of the opinion the Court says, "The real difficulty which has been injected into this case seems to come out of the fact that there is a slough or high water channel flowing from the Snake River at the upper end of this island for a distance of about one mile and a half and thence returning to the main stream and separating the island from the mainland." The Court, at different places, refers to the East Channel as a slough, and refers to the survey or map made by Mr. Utter, on page 504 of the opinion, and says that "he (Utter) designates the channel of the east side as a slough." We respectfully protest against the east channel being denominated either a high water channel or a slough for it is in fact neither. It was conceded by every witness who testified in relation to the matter, in fact it was positively stated by every witness

who testified in relation to this channel that it carried a large
121 volume during all seasons of the year; that it never had been known to be dry; that it had never been known to be less than one foot in depth at the shallowest point and from three to four hundred feet in width. The opinion shows and the record shows that from the upper end of the island to the lower end of the island the east channel has a fall of six feet. This is several times the fall of the Mississippi River, and to term it a slough is so clearly a misapplication of the word "slough" that we think it should be corrected, as it may be misleading and may unjustly operate against the appellant in future proceedings.

We call attention also to the fact that the record shows that the map which Mr. Utter had made was admitted "with the word 'slough' stricken out where it appears on such map." Folio 115. There was no evidence that the word had been placed on the map by Mr. Utter, and if it had it should not operate against appellant for Mr. Utter was not a witness and we were not permitted to examine him as to what he meant by the word, if he was responsible for it. The term High Water Channel is equally unappropriate for the channel is as much a low water channel as a high water channel; it is an ever flowing stream during both high and low water.

On page 513 the Court states with some detail the manner of checking up Government surveys. The Court does not say whether this method was employed in 1868, when the mainland was surveyed, or whether it is a method that has recently been adopted by the Department. There is no evidence in the record that the original survey was passed upon in the manner stated by the Court, and we think the statement contained in the opinion in relation to the manner in which Government surveys must be executed is prejudicial to appellant and should not be considered by the Court in determining the questions presented by the record.

122 On page 516 the Court says, "Poole resided on this island as early as 1883 and was living there it seems when he made proof on and secured title to Lots 1, 2, 3 and 4 adjacent to the island on the east." The suggestion that Poole was living on the island while acquiring title under the homestead laws to lots 1, 2, 3 and 4 cannot be sustained by the record. No one ever made such a contention. From the suggestion contained in the opinion it would appear that he claimed the mainland by reason of his occupancy of the island when the facts were exactly the reverse. Originally he claimed the island by reason of having possession, but when he entered the lots on the mainland opposite the island under the Homestead laws he established his residence on such lots and thereafter claimed the island, during part of the time, by reason of his ownership of the mainland opposite the island, and during other times he claimed it under the mineral land laws. Upon this point there was no controversy whatever between the litigants or their counsel and for that reason all the testimony which was introduced in the lower Court bearing upon the point was not embraced in the record on appeal, but we think the record will not justify the conclusion that the Government recognized residence on the island as sufficient resi-

dence under the homestead laws to entitle Mr. Poole to a patent to the main land. This suggestion in the opinion is so prejudicial to the rights of the appellant in future proceedings that we must again ask the Court to modify the opinion.

We will now take up some of the legal questions involved.

As heretofore stated, we are firmly of the opinion that the majority of the Court, presumably due to a misapprehension of the facts, applied to this case certain legal principles and legal doctrines which have no application to the facts as we find them here. As stated in our former brief, this action does not involve the
123 question of title to real property formed through accretion or reliction and the authorities bearing on the title to land thus formed and the principles of law applicable in such cases have no application to the questions which arise in this case. The authorities bearing upon the question of title to islands must be considered in the light of the facts surrounding the case; their application to any particular case must be determined by the size of the island, the time of its formation relative to the time of the admission of the State into the Union, the permanency of the island and the nature of the water channels surrounding it.

The Court in its opinion discusses at considerable length the authorities bearing upon the question as to whether a riparian owner takes to the water line or to the center thread of the main channel. We respectfully submit that that question is of but minor importance in the case at bar; in fact, it has no connection whatever with the title to the island itself for the island is not part of the river channel. The suggestion contained in the opinion that "we are at once confronted with two lines of authorities from the Supreme Court of the United States" we think does that great Court an injustice if by such statement it is meant that that Court has decided both for and against the position which appellant takes in the present case. We respectfully submit that the Supreme Court of the United States has constantly and always, whenever the question has been before it, taken the identical position which appellant maintains here. That Court has repeatedly held that riparian owners take title to islands between the thread of the stream and the meander line, but in every such case the islands were formed after the State was admitted into the Union, and in every such case the local law gave the riparian owner title to the center of the river channel.

124 The important doctrine which controls this case, and to which there is no exception, was stated in our former brief, at page 9, as follows: "Islands formed before the admission of the State into the Union are subject to disposal by the Federal Government the same as other public lands. If they are formed after the admission of the State the question whether they belong to the riparian owner or the State, is governed by local law."

1 Farnham on Waters, p. 50.
Mission Rock Co. vs. U. S., 109 Fed., 763.
Shibeley vs. Bowlby, 152 U. S., 1; 38 L. Ed., 331.
Ill. C. R. Co. vs. Ill., 146 U. S., 387; 36 L. Ed., 1018.
Martin vs. Waddell, 16 Pet., 367; 10 L. Ed., 997.

We respectfully submit that no decision of the United States Supreme Court can be found sustaining a contrary doctrine. This proposition is fundamental, and, we repeat here, that the authorities cited in the majority opinion which relate to reliction rights or to accretion rights or to newly formed islands have not the slightest reference or bearing upon the question involved in this case. It is not a question of public surveys, for it must be conceded that the Government is not required to survey all its public lands at one time, and the failure of an irresponsible survey to show in detail the unsurveyed land or an island in a stream which he has not surveyed cannot operate to pass title from the Government to the riparian owner; neither can it estop the Government from establishing its title to the unsurveyed land when its attention in called to it. Such doctrine would be revolutionary in its effect. It would vest power in a public surveyor to strip the Government of its public domain by a mere method of survey. In other words, it would vest in such surveyors power greater than is now vested in the entire executive department of the Government. Not even the Commissioner of the General Land Office, the President of the United States or
125 the Secretary of the Interior can donate an acre of public land without a special Act of Congress. They are authorized to sell it in the manner in which Congress has provided, but only after it has been properly surveyed. Unsurveyed public land no person has, under the law as it now stands, authority to dispose of. The majority opinion in this case, however, proceeds upon the theory that the surveyor could estop the Government from claiming what was its own and that he could add some 138 acres of good land to the acreage granted by the Government in its patent to the entryman of the lots on the main land, by simply neglecting to note on the plat that there was some additional land beyond his survey line which he had not surveyed.

We are not questioning the correctness of the former decisions of this Court on the facts before the Court in those cases. We think the conclusions reached were correct. Neither are we questioning the correctness of the authorities cited by the Court in its opinion, but we do contend that those authorities have no application to this case. The suggestion made by the Court that there is a difference between the manner in which title passes to land under tide water and land under the navigable streams of this country we respectfuly submit is at variance with the authorities. This Court has repeatedly held that no lines could be drawn in this country between tide water and fresh water when navigable, and Snake River has been decreed a navigable stream and was so held to be by the Court in this case. Hence there can be no distinction between title to islands formed in tide water before the admission of the State and islands formed in a navigable stream before the admission of the State.

The case of the United States vs. Mission Rock Company, 109 Federal, 763, and 47 L. Ed., 865, is therefore directly in point. Neither can the Government be held estopped from claiming the

island simply because it has not kept a representative on it in
126 the past or because someone has not seen fit to enter it under the public land laws. If this doctrine should be applied generally the Government would lose much of its public domain.

Review of Cases Cited in Opinion.

To show the inapplicability of the cases cited in the opinion to the facts in this case, we will review briefly the leading cases cited by this Court.

Butler v. Grand Rapids, etc., R. R. Co., 85 Mich., 246; 159 U. S., 87:

This appears to be a leading case. An examination of this case shows that the facts are so entirely different that no principles controlling the decision in that case can have any application here. The island consisted of only two and 56/100 acres. The channel was from seventy five to one hundred feet in width, but was entirely filled in at the time of the trial, so the island was directly connected with the main land. The main land was surveyed in 1831 and four other islands in the river at that point were surveyed in 1837, but the insignificant island in dispute was not surveyed until 1855. The surveyor's notes from the survey of the other four islands some twenty years before showed that the so-called island in dispute was at that time only a sand bar and was evidently purposely omitted from the survey when the other islands were surveyed, because it was not considered as either permanent or as having any value.

The Supreme Court of the United States, after reviewing the facts which we have stated above, says:

"We have no doubt from the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud. * * *."
127 The decision in that case was based upon Webber vs. The Pere Marquette Boom Co., 62 Mich., 626, which was a case that dealt entirely with a lake front which was completely covered by water, but which under some pretense or other had been surveyed, and the Court in that case said:

"To give the Commissioner jurisdiction to act, two facts must exist: (1) There must have been an island which was omitted from the surveys when the adjacent territory was surveyed; (2) The land must not have been previously conveyed by the United States.

"The evidence returned in this record shows conclusively and without contradiction that no island upon Section 26 was omitted from the survey made by the United States in 1838; that no island existed nor now exists where the plat offered in evidence by the Plaintiff represents that there is an island.

"An island is a body of land surrounded *surrounded* by water. The premises described in Plaintiff's declaration and in his patents is a body of land covered by water. To call this submerged fen an island is a palpable misnomer."

This is the leading case relied upon by the Court in the case of Butler vs. Grand Rapids, Etc. Co., Supra. It is apparent that there is not the slightest similarity between the case at bar and those cases, and that the principles announced in those cases can have no application here. The Court, however, in the Webber case lays down principles which, when applied to the case at bar, sustain the contention of Scott. The Butler case was also based upon a decision in Fletcher vs. Thunder Bay, Etc. Boom Co., 51 Mich., 277, but the facts in that case were substantially the same as in the Webber case.

The Court in the Butler case also bases its decision upon the case of Middleton vs. Pritchard, 3 Scam. (4 Ill.) 510, and we quote from the opinion of the Court in that case to show that the doctrine upon which that decision rests can have no application in the case at bar:

"The island or peninsula is separated from the main land by a slough, formed by a gradual slope from each side, through
128 which the water of the river runs two or three months in the year. The main land is over-flowed in high water. In low water the slough is dry, except some pools of standing water; and is filled with drift wood. The timber on the island and main land approaches within two or three rods of each other; part of the bed of the slough produces grass * * *. It appears the surveyor of the Government traced the courses and distances along the margin of the slough, not the main land, in order to estimate the quantity of land in the fraction; and which estimate did not include the locus in quæ."

There had been no survey of the so-called islands, nor was it shown on the plat, and as between a mere intruder who did not connect himself with the Government title in any way and the owner of the adjacent land, the latter was held to have the better title, under the Illinois rule according to which a riparian owner takes to the meander thread of the stream.

Hardin vs. Jordin, 140 U. S., 371, and Mitchell vs. Smale, 140 U. S., 406:

These cases are cited by the court as leading cases on the principles involved in the case at bar. We respectfully submit that the decisions in those cases were governed by entirely different principles from those involved in the present case. In those cases it appeared that the lake shown on the Government plat and lying beyond the meander line had been gradually drying up until there was a large area of dry land between the meander line and what little water was left in the lake. The Government in later years caused a survey to be made of the lake bed and sold the land so surveyed to other parties. The Court simply held that the riparian owner was entitled to take to the water and as the water receded he was entitled to the land left bare and dry on the well known principles governing reliction rights.

The question of title to islands, such as we have in the case at bar, that were in existence at the time of the admission of the State into the Union, was not involved in either of those cases. They
129 were determined solely and exclusively upon the principles governing accretion and reliction rights. Anything said in

those cases that would affect the question involved in the case at bar, in the slightest degree, would be dictum. The Supreme Court of the United States has itself frequently in later years held directly the opposite under facts somewhat similar to what we have in the present case.

Whittaker vs. McBride, 197 U. S., 510:

In this case it appeared that the island was of recent origin and that the Government had repeatedly refused to survey it. The Land Department, had, therefore, held that it was not public land. But even after the Government had refused to survey the so-called island, the applicant still persisted in claiming it and the owner of the adjoining land brought suit to quiet title. The Court among other things, said:

"It must also be noticed that the Government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island, or of the rights which would result in case it did make such survey. * * * Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest Court, the riparian proprietors are the owners of the bed of the stream to the center of the channel; that the Government as original proprietor, has the right to survey and sell any lands, including islands in the river or other bodies of water; that if it omits to survey an island in a stream, and refuses when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to be surveyed, and proceed to occupy it for the purpose of homestead or preemption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler."

Chandos vs. Mack, 77 Wis., 573.

The island involved in this case contained between two and three acres, was about 1,250 feet long and from seventy to three hundred feet in width. The Court states in its opinion, that:

130 "It is separated from the west bank of the river by a narrow channel or slough, which varies in width from 95 to 100 feet. * * * It is not overflowed in ordinary freshets, but is substantially submerged in extraordinary floods. * * * There is nothing which tends to show that the Government intended to reserve the island as part of the public domain. The island is referred to in the field notes of the meander line, but it was not surveyed, though its location is marked upon the plat of surveys, so the fact of its existence was not overlooked by the agents of the Government when such surveys were made.'

It must be apparent that the principles which would control under a state of facts such as we have above could have no application in the case at bar. An island subject to overflow during high water is properly part of the bed of the stream and goes to the riparian owners; and when it was so insignificant in size there could be no reason to believe that the Government would ever cause it to be sur-

veyed, but the presumption would prevail that it was intended to pass with the adjacent land or to the owner of the bed of the stream, the fee of which in the State of Wisconsin rests in the owner of the adjacent land. The surveyor having marked it on the Government plat was conclusive evidence that the Department had not overlooked it by mistake.

Houck vs. Yates, 82 Ill., 179, and Fuller vs. Dauphin, 124 Ill., 542:

These cases deal with accretion lands in the Mississippi River, formed after the adjacent lands had passed into private ownership. They, therefore, have no application in this present case.

St. Paul & Pac. R. R. Co. vs. Schurmeir, 10 Minn., 99; 74 U. S., 272:

This is another of the cases frequently cited. It has probably been cited more than any other case in connection with accretion and reliction rights and the question of meander lines. An examination of the case will show that the facts in that case and the principles which control the decision, can have no application in the
131 case at bar. The United States Supreme Court in its opinion in that case, says:

"When the water in the river was at a medium height, there was a current in the channel between what is called the island and the bank, where the meander posts were located, but when the water was low there was no current in that channel, and, when the water was very high in the river, the entire parcel of land, designated as the island, was completely inundated."

The evidence also showed that the city of St. Paul had filled in the so called channel and extended its streets over and across the so-called island to the wharves and landings which were on the river side of the island. The Court held that it was embraced in the patent for the main land as it lay above the low water mark, and in the State of Minnesota the riparian owner along a navigable stream takes to low water. The decision has been so frequently distinguished, even by the Supreme Court of the United States, that its application has long since been limited to the peculiar facts in that case, and its doctrine has never been extended to islands entirely surrounded by water during all seasons of the year and not subject to overflow.

Gould in his work on waters, Section 77, in referring to this case, says:

"The question was as to the title to an island in the Mississippi River, which at the time of the survey was a mere sand bar about 95 feet wide and 160 feet long, separated from the main land by a slough or channel 28 feet wide. The island was submerged at high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main river. At the time of the action, the sand bar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction and the railroad company which claimed

the bar under a new survey made by the United States Surveyor, and a Congressional grant of certain odd numbered sections. It was held that the sand bar was included in the first survey as part of the main land."

Jefferis vs. East Omaha Land Company, 33 L. Ed., p. 72, dealt exclusively with accretion land. In the opinion it is
132 held:

"About the time of the original entry of Lot 4 by Edmund Jefferis, new land was formed along and against the whole length of the north line thereof, and from that time continued to form until 1870, so that in that year, at a distance of twenty chains and more from the original meander line before described, and within the lines of the lot on the east and west running north and south, a tract of forty acres and more had been formed by accretion to the lot, and ever since has been and now is a part thereof."

The new made land was the cause of the dispute. It is apparent that the principles applicable to that case have no application here.

St. Louis vs. Rutz, 34 L. Ed., 911:

This case arose over an island in the Mississippi River formed long after the admission of the State into the Union. It depended upon the local laws as to whether it belonged to the State or to the riparian owner. In this case, however, the Court states generally the principle which we are contending for (in syllabus):

"The owner in fee of the bed of a river or other submerged land is the owner of any bar, island or dry land which subsequently may be formed thereon."

Under that principle the island in this case is the property of the United States for it was formed while the title to the bed of Snake River was in the United States, and the transfer to the State of the title to the bed of the river, did not carry with it the title to islands which were no part of the bed of the river. Under the decision of this Court in this case the result would have been the same if the island had contained thousands of acres, provided the Government Surveyor did not show it on the plat of the original survey of the main land.

We respectfully submit that there is sufficient doubt about the correctness of the decision in this case to justify the Court in
133 granting a re-hearing and permitting the appellant to be heard and more fully show to the Court wherein the decision rendered is incorrect, and why the judgment of the lower Court should be reversed.

RICHARDS & HAGA,
Attorneys for Appellant.

[Endorsed:] In the Supreme Court of the State of Idaho. C. P. Lattig, Respondent, vs. John E. Scott, Appellant, and Robert Green, Respondent. Petition for Rehearing. Filed Jan. 31, 1910. I. W. Hart, Clerk.

134 The Supreme Court of the State of Idaho.

JOHN E. SCOTT, Plaintiff in Error,
vs.
C. P. LATTIG and ROBERT GREEN, Defendants in Error.

Petition for Writ of Error.

To the Honorable Isaac N. Sullivan, Chief Justice of the Supreme Court of the State of Idaho:

Comes now the above named John E. Scott, Plaintiff in Error, and complains and alleges:

That on the 11th day of January, A. D. 1910, the Supreme Court of the State of Idaho, rendered a final judgment against your petitioner, the said John E. Scott, in a certain cause wherein the said John E. Scott was appellant and the said C. P. Lattig and Robert Green, were respondents, and thereafter a petition for rehearing was filed, presented, considered and on the 10th day of February, A. D. 1910, denied by this Court, whereupon said judgment became final.

That the said John E. Scott was, and is aggrieved in that, in said judgment and the proceedings had prior thereto in this cause, certain errors were committed to his prejudice; that the said final judgment and the decision of the Supreme Court of the State of Idaho, deprived the said John E. Scott, who now is and
135 then was, a citizen of the United States, of rights, privileges, and immunities secured to him under the Constitution and laws of the United States; that in said action, your petitioner claimed the right to the possession and enjoyment of certain lands filed upon and held by your petitioner under the Public Land Laws of the United States, and the decision of this Court is against the title and right claimed by your petitioner, and as he believes, contrary to the Constitution and Statutes of the United States relating to the sale and disposition of public lands, all of which will more fully appear by reference to the record and proceedings in said cause, and from the assignment of Errors filed herewith.

And your petitioner claims the right to remove said judgment and decree to the Supreme Court of the United States by writ of error, under Section 709, of the Revised Statutes of the United States, because and for the reason above set forth, and as will appear more fully from the said assignment of Errors, and by the record in said cause.

Wherefore, your petitioner prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Idaho and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected and said judgment and decree reversed and set aside, and for citation and supersedeas; and your petitioner will ever pray.

JOHN E. SCOTT, *Petitioner.*
By OLIVER O. HAGA,
JAMES H. RICHARDS,
His Attorneys.

UNITED STATES OF AMERICA,
State of Idaho, ss:

Let the Writ of Error issue upon the execution of a bond by John E. Scott ~~to C.~~ P. Lattig and Robert Green, in the sum of Five Hundred Dollars ($500.00), as per stipulation of counsel for the parties hereto; such bond when approved, to act as a supersedeas.

Dated this 6th day of May, 1910.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of Idaho.

[Endorsed:] In the Supreme Court of the State of Idaho. John E. Scott, Plaintiff in Error, vs. C. P. Lattig and Robert Green, Defendants in Error. Petition for Writ of Error. Filed May 6, 1910. I. W. Hart, Clerk. Richards & Haga, Attorneys for John E. Scott, Plaintiff in Error. Office: First National Bank Building, Boise, Idaho.

 In the Supreme Court of the State of Idaho.

JOHN E. SCOTT, Plaintiff in Error,
vs.
C. P. LATTIG and ROBERT GREEN, Defendants in Error.

On Writ of Error from the Supreme Court of the United States.

Assignment of Errors.

Now comes the said John E. Scott, plaintiff in error, by his attorneys, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Idaho, in the above entitled matter, there is manifest error, in this, to-wit:

1. That said Supreme Court erred in adjudging and deciding that your petitioner had no right, title or interest in or to Lots 5, 6, and 7, Section 15, and Lots 6 and 7 of Section 22, Township 9 North, Range 5 West, B. M., Canyon County, Idaho, or any part thereof.

2. That said Supreme Court erred in adjudging and deciding that the defendants in error were the owners of the lots above described, and that the United States parted with its title to said lots under its patent dated the 29th day of May, 1894, issued to Samuel W.
 Poole for Lots Numbered 2, 3 and 4 in Section 15, Township 9 North, Range 5 West, B. M., and under its patent dated the 4th day of February, 1895, issued to Robert Green for Lots Numbered 1 and 2 and the S. E. ¼ of the N. E. ¼ of Section 22, Township 9 North, Range 5 West, B. M.

3. That said Supreme Court erred in adjudging and deciding that the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County, in the trial of the said cause, did not err in refusing to admit in evidence Exhibit No. 6 offered by

plaintiff in error, the same being a receipt given to said plaintiff in error by the Receiver of the United States Land Office, showing that said plaintiff in error had paid the necessary filing fees and entered the land described in Paragraph 1 hereof as a homestead under the United States Homestead Laws.

4. That said Supreme Court erred in adjudging and deciding that the said Samuel W. Poole, predecessor in interest of the said C. P. Lattig, respondent, and the said Robert Green, under their patents from the United States for the lands described in Paragraph 2 hereof, acquired title not only to the land between the meander line of their said tracts of land and Snake River, but also to the then unsurveyed island, which, when surveyed, is embraced within and consists of the lots described in Paragraph 1 hereof.

5. That the said Supreme Court erred in adjudging and deciding that the United States was estopped from claiming any interest in the said island consisting of the lots described in said Para-
139 graph 1, or from selling or offering to sell the same, or permit the plaintiff in error to enter the same under the public land laws of the United States.

6. That the said Supreme Court erred in adjudging and deciding that the lands of the defendants in error extend westerly to the center of the main channel of Snake River, instead of to the center of the east channel of said River.

7. That said Supreme Court erred in quieting the title of defendants in error to the lots described in Paragraph 1 hereof.

8. That said Supreme Court erred in not holding and deciding that plaintiff in error was lawfully in possession of the lots described in Paragraph 1, under the public land laws of the United States, and in not holding and deciding that the said defendants in error had no right, title or interest thereto or therein, or in any part thereof.

9. That said Supreme Court erred in not setting aside the judgment rendered by the trial Court and ordering a dismissal of said action.

10. That the judgment and decision of said Supreme Court is repugnant to and in conflict with the laws of the United States relating to the sale and disposal of the public lands, and said judgment and decision is repugnant to and in conflict with that portion of Section 3 of Article IV of the Constitution of the United States which declares that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other
140 property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States, or of any particular State."

11. Plaintiff further says that in the aforesaid action there was drawn in question the right and power of the United States Government to survey and sell or permit to be filed upon and entered under the public land laws of the United States, an island consisting of one hundred and thirty-eight and fifteen one-hundredths (138.15) acres of agricultural land situated in a navigable river and formed long prior to the admission into the Union of the State in which the island is situated, and there was also drawn in question the extent of

the grants made by the United States under its patents to the riparian land situated on the main land opposite the said island. Your plaintiff in error, in said action contended that the said island, when he first entered thereon and took possession thereof, was part of the unsurveyed public domain of the United States, and that thereafter it was properly and legally surveyed by and under the authority of the United States, and was thereafter duly and legally and in accordance with the public land laws, entered and filed upon by plaintiff in error under Section 2290 of the Revised Statutes of the United States, and that he was at the time of the trial of said cause and for several years immediately prior thereto had been lawfully in possession thereof, and the said Supreme Court of the State of Idaho, by its final decision in this cause, held and decided adversely to and against the contention so made by your plaintiff in error, and
141 held and decided adversely to and against the right, title and privilege so especially set up and claimed under the public land laws, statutes and constitution of the United States; and said Supreme Court held and decided in its said final decision, that plaintiff in eror had no right, title or interest in or to the said island, and that said island when surveyed by and under the authority of the United States, was not part of the public domain and that the United States Government had long prior thereto conveyed said island under its patents to and for the main land situate opposite said island, notwithstanding the said island and the whole thereof was situated wholly beyond and some distance from the boundary of the lots, tracts and parcels of land described in said patents, to which judgment, decision and decree plaintiff in error excepts and assigns the same as error.

Wherefore, for this and other manifest errors appearing in the record, the said John E. Scott, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Idaho be reversed and set aside, and held for naught, and that judgment be rendered for plaintiff in error, granting him his rights under the constitution, statutes and laws of the United States, and that he be restored to all things which he has lost by this action, and because of the said judgment and decision, and that he may have judgment for his costs.

OLIVER O. HAGA,
JAMES H. RICHARDS,
Attorneys for John E. Scott, Plaintiff in Error.

Office: First National Bank Building, Boise, Idaho.

[Endorsed:] In the Supreme Court of the State of Idaho. John E. Scott, Plaintiff in Error, vs. C. P. Lattig and Robert Green, Defendants in Error. Assignment of Errors. On Writ of Error from the Supreme Court of the United States. Filed May 6, 1910. I. W. Hart, Clerk. Richards & Haga, Attorneys for John E. Scott, Plaintiff in Error. Office: First National Bank Building, Boise, Idaho.

142 In the Supreme Court of the State of Idaho.

JOHN E. SCOTT, Plaintiff in Error,
vs.
C. P. LATTIG and ROBERT GREEN, Defendants in Error.

Bond.

Know all men by these presents, That we, John E. Scott, as Principal, and D. S. Lamme, and Charles McCosh, of Payette, Idaho, as sureties, are held, and firmly bound unto Charles P. Lattig and Robert Green, in the sum of Five Hundred Dollars ($500.00.), to be paid to the said obligees, their successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of May, A. D., 1910.

Whereas, The above named plaintiff in error hath prosecuted a Writ of Error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho.

Now therefore, The condition of this obligation is such that if the above named plaintiff in error shall prosecute his said Writ of Error to effect, and answer all cost and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Signed) JOHN E. SCOTT.
D. S. LAMME.
CHARLES McCOSH.

Signed, Sealed and Delivered in the Presence of—
M. G. RIEBELING.
F. H. BROWN.

143 STATE OF IDAHO,
County of Canyon, ss:

D. S. Lamme, and Charles McCosh, whose names are subscribed to the foregoing instrument being severally duly sworn, each for himself says: That he is of lawful age and is a citizen of the State of Idaho, and a resident freeholder in Canyon County, said State, that he knows the contents of the foregoing instrument to which he has attached his name, and that he is worth the sum of Five Hundred Dollars ($500.00), the amount specified as the penalty thereof, over and above his just debts and liabilities, exclusive of property exempt from execution.

(Signed) D. S. LAMME.
CHARLES McCOSH.

Subscribed to and sworn to before me, this 3d day of May, 1910.

[SEAL.] M. G. RIEBELING,
Notary Public, Canyon County, Idaho.

My Commission expires July 2, 1911.

I hereby approve the foregoing bond and sureties, this — day of May, 1910, said bond to operate as a supersedeas.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

143½ [Endorsed:] Copy. No. —. In the Supreme Court of the State of Idaho. John E. Scott, Plaintiff in Error, v. C. P. Lattig and Robert Green, Def'ts in Error. Bond. Filed this 6 day of May, 1910. I. W. Hart, Clerk.

144 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles P. Lattig, Designated as C. P. Lattig, and Robert Green, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Idaho, wherein John E. Scott is Plaintiff in Error, and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Idaho, this 6th day of May, 1910.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

[Seal of Supreme Court, State of Idaho.]

Attest:
I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

145 STATE OF IDAHO,
County of Ada, ss:

I, the undersigned, attorney of record for Robert Green, one of the Defendants in Error in the above entitled cause, hereby acknowledge due service of the above citation.

Dated this 6th day of May, 1910.

KARL PAINE,
Attorney for Robert Green.

STATE OF IDAHO,
County of Canyon, ss:

I, the undersigned, attorney of record for C. P. Lattig, one of the Defendants in Error in the above entitled cause, hereby acknowledge due service of the above citation.

Dated this 7th day of May, 1910.

IRA W. KENWARD,
Attorney for C. P. Lattig.

145½ [Endorsed:] In the Supreme Court of the State of Idaho. John E. Scott, Plaintiff in Error, vs. C. P. Lattig and Robert Green, Defendants in Error. Citation. Filed on return May 11, 1910. I. W. Hart, Clerk, Supreme Court of Idaho.

146 *Certificate of Lodgment.*

SUPREME COURT,
State of Idaho, ss:

I, I. W. Hart, Clerk of the said Supreme Court, do hereby certify that there was lodged with me as such Clerk, on May 6th, 1910, in the matter of John E. Scott, Plaintiff in Error, v. Charles P. Lattig and Robert Green, Defendants in Error, the following instruments:

1. Original Bond of which a copy is herein set forth.
2. Three copies of the Writ of Error as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Boise City, Idaho, this 6th day of May, 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court of Idaho.

147 In the Supreme Court of the State of Idaho.

C. P. LATTIG, Plaintiff and Respondent,
vs.
JOHN E. SCOTT, Defendant and Appellant, and ROBERT GREEN, Defendant and Respondent.

Stipulation.

It is hereby stipulated by and between the above named parties through their respective attorneys, that any Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Idaho, issued upon the petition of the said appellant shall

operate as a supersedeas upon the filing of a cost and supersedeas bond to the amount of Five Hundred Dollars ($500.00.).

Dated this 27th day of April, 1910.

IRA W. KENWARD,
Attorney for C. P. Lattig.
KARL PAINE,
Attorney for Robert Green.
RICHARDS & HAGA,
Attorney for John E. Scott.

Endorsed: Filed May 6, 1910. I. W. Hart, Clerk.

148 In the Supreme Court of the State of Idaho.

C. P. LATTIG, Plaintiff and Respondent,
vs.
JOHN E. SCOTT, Defendant and Appellant, and ROBERT GREEN, Defendant and Respondent.

Certificate of Clerk.

I, I. W. Hart, clerk of the supreme court of the State of Idaho, do hereby certify the foregoing transcript to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court and that the same constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 16th day of June, A. D., 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court, State of Idaho.

Endorsed on cover: File No. 22,237. Idaho Supreme Court. Term No. 86. John E. Scott, plaintiff in error, vs. Charles P. Lattig, designated as C. P. Lattig, and Robert Green. Filed June 22d, 1910. File No. 22,237.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 86

JOHN E. SCOTT, PLAINTIFF IN ERROR.

vs.

CHARLES P. LATTIG AND ROBERT GREEN.

BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

STATEMENT OF THE CASE.

This action was brought by the defendant in error, Charles P. Lattig, to quiet his title to what was then an unsurveyed island known as Poole Island, and containing 138.15 acres of agricultural land, surrounded by two channels of Snake river (a navigable stream), one about 1000 feet in width, known as the West channel, and the other about 400 feet in width, known as the East channel, each channel carrying a large volume of water during all seasons of the year.

John E. Scott, plaintiff in error, and Robert Green, one of the defendants in error, and several other parties were made defendants. Lattig based his claim to the island on the fact that he was the owner of riparian land along the East channel opposite the island. Robert Green made a similar claim to part of the island. John E. Scott, plaintiff in error, contended that the island was, at the time the suit was commenced, part of the unsurveyed public domain, and that he was in possession, intending to enter it under the homestead land laws of the United States. Between the

commencement of the suit and the time of trial the island was surveyed by the government and actually entered under the Homestead Act by Scott and he was so holding it at the time of trial.

The District Court decreed that Lattig was the owner of that portion of the island situated opposite the riparian land which he owns, and that Green was the owner of that portion lying opposite the riparian land owned by him. This decree was sustained by the Supreme Court of Idaho, and the cause is here on writ of error to that Court.

The facts stated more in detail, so far as they are material to an understanding of the case, are as follows:

The island has apparently been in existence as long as the mainland across the channel, in any event it was in existence when the witnesses who testified in the case first knew the river at that point. It is about 8000 feet in length and contains an area of 138.15 acres, according to the government survey made in June, 1906. Part of it is covered with timber from which wood has been cut from the time of the earliest settlement (Trans. pp. 26, 34, 38). It had not been cultivated to any extent prior to January, 1904, when Scott took possession; and what was not covered with timber was used for pasture or for raising wild hay. It is not subject to overflow or inundation during even the highest stages of the river (Trans. pp. 20, 21, 26, 33, 34, 35, 38),

The island was first occupied by one Shell for several years immediately prior to 1883, who claimed it by right of *possession* and not because of the ownership of riparian land, for he claimed no other land in that vicinity (Trans. pp. 22, 23, 41). Shell sold his squatter's right to one Poole, who likewise claimed it by right of possession for a few years (Trans. pp. 21, 22, 41). About 1884 Poole entered under the homestead land laws lots 2, 3 and 4 of Section 15, on the mainland lying opposite the north half of the island, and thereupon he established his residence on the mainland and patent for said lots was issued to Poole on May 29, 1894. Lattig deraigns title to the island under a quit claim deed through the estate of Poole. On February 4, 1895, patent was issued by the United States government to Robert Green for lots 1 and 2, and the SE¼ of the NE¼ of Section 22, lying opposite the south half of the island.

Between the island and the lands, patented as aforesaid to Poole and Green, lies the East channel of Snake river. This channel is about 400 feet in width, and carries a large volume of water during all seasons of the year, there being a fall of about six feet in the channel from the upper to the lower end of the island (Trans. p. 26).

The island was not occupied by any one after Poole established his residence on the mainland, except about 1893, when Poole and others prospected the island for minerals and located the same under the placer mining laws as part of the unappropriated public domain subject to entry under the mining laws (Trans. p. 41). The mining operations were not continued and the island was thereafter used indifferently for pasturing cattle, for raising wild hay, and for fire wood.

In January, 1904, John E. Scott, believing that the island was part of the unsurveyed public domain, established his residence thereon with a view of acquiring title thereto from the United States under the homestead land laws, and shortly thereafter he made application to the government for a survey of the island, and such proceedings were had on his application that the Land Department caused a survey of the island to be made in June, 1906. The survey was accepted by the Commissioner in December, 1906 (Scott's Ex. 4, p. 46), and the plat filed in the United States Land Office at Boise, Idaho, on July 4, 1907, at 9 o'clock A. M., and at 9:01 A. M. on said day the plaintiff in error, John E. Scott, entered the land included in the island under the Homestead Act (see Certificate on Scott's Ex. 4, Trans. p. 46, also receipt for fees paid, p.33). Scott has been in possession continuously since January, 1904.

The island was never a part of the *bed* of the river. The evidence would indicate that in the remote past it was cut off from the mainland by one of the present channels of the river (Trans. p. 38). The mainland was surveyed in September, 1868, and the plat of the survey shows a meander line coinciding with the East channel of the river. The island is not noted on the plat of the original survey. The full acreage patented to Poole, the predecessor in interest of Lattig, and for which he paid the government is contained in lots patented without going beyond the meander

line. The same is true as to the land patented to Green. But defendants in error claim that under their patent they take not only the land therein described, and for which the government received pay, but also:

(a) A strip of land varying in width from 100 to 600 feet, lying between the meander line and the East channel of the river;

(b) The entire East channel, approximately 400 feet in width;

(c) The island in controversy, containing 138.15 acres of high agricultural land;

(d) To the middle thread of the West channel of Snake river, which channel is approximately 1000 feet in width.

The area thus claimed by defendants in error and lying beyond their meander line, amounts to several times the area within the lots described in the patent.

Scott concedes that defendants in error are entitled to the strip of land between the meander line and the East channel, designated as "a," supra, but contends that the boundary of their lands extends only to the center of the East channel of the river.

The Supreme Court of Idaho held that the Land Department was without jurisdiction to order a survey of the island, and that the government was in effect estopped by the old survey and by the patents issued thereunder, for the reason that the island was not shown on the original plat, and the failure of the surveyor to note the island either in his notes or on the plat was evidence that it was the intention of the government to pass the island as an incident or appurtenance under the patents to the lots on the mainland opposite the island.

Snake river, as stated above, is a navigable stream, and under the laws of Idaho the bed of navigable or meandered streams is owned by the riparian owners, each taking to the center of the stream, subject to the public right of navigation.

The opinion in this case was by a divided court, two of the Justices sustaining the contentions of the defendants in error, and the third holding with plaintiff in error.

SPECIFICATIONS OF ERRORS.

The errors assigned on the application for the writ are set out in full in the printed record, pages 39-81, inclusive. Briefly stated, they are:

1. That the Supreme Court of Idaho erred in adjudging and deciding that plaintiff in error had no right, title or interest in or to what is known as Poole Island, or any part thereof, being lots 5, 6 and 7 of Section 15, and lots 5 and 6 of Section 22, Township 9 North, Range 5 West, B. M., Canyon County, Idaho.

2. That said Supreme Court erred in adjudging and deciding that the defendants in error were the owners of said Poole Island, taking title thereto under patents from the government to lands situated across the East channel, opposite said island, viz: Under patent dated May 29, 1894, to Samuel W. Poole for lots 2, 3 and 4 in Section 15, and under patent dated February 4, 1895, to Robert Green for lots 1 and 2, and the SE¼ of the NE¼ of Section 22, Township 9 North, Range 5 West, B. M.

3. That said Supreme Court erred in adjudging and deciding that the trial court did not err in refusing to admit in evidence Exhibit No. 6 offered by plaintiff in error, the same being a receipt given to said plaintiff in error by the Receiver of the United States Land Office, Boise, Idaho, for $15.18, being the amount of fees and compensation of Register and Receiver for the entry by said Scott of said Poole Island under the homestead land laws of the United States and showing the entry of the island by Scott under said laws (Trans. p. 53).

4. That the said Supreme Court erred in holding and deciding the United States was estopped from claiming any interest in said island or from surveying, selling or offering to sell the same.

5. That said Supreme Court erred in not holding and deciding that defendants in error had no right, title or interest in said Poole Island, and in quieting the title of said defendants thereto.

6. That the said Supreme Court erred in not setting aside the judgment rendered by the trial court, and ordering a dismissal of said action.

POINTS AND AUTHORITIES.

Grants by the Government.

Public grants convey nothing by implication; they are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants. Nothing passes by a public grant but that which is necessarily or expressly embraced in its terms.

United States v. De la Maza Arredondo, 6 Pet. 691, 8 L. Ed. 547.
Charles River Bridge v. Warren Bridge, 11 Pet. 420, 546, 9 L. Ed. 773, 823.
Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.
Martin v. Waddell, 16 Pet. 367, 411; 10 L. Ed. 997, 1013.
Central Trans. Co. v. Pullman Pal. Car Co., 139 U. S. 24, 49; 35 L. Ed. 55, 64.

Whenever the question in any court, State of Federal, is whether the title to land which has once been the property of the United States has passed from the Federal Government, that question must be resolved by the laws of the United States.

Wilcox v. Jackson, 13 Pet. 498, 517; 10 L. Ed. 264, 273.
Irvine v. Marshall, 20 How. 558, 15 L. Ed. 994.
Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534.

The Congress alone has, under Art. IV, § 3 of the Constitution, the power to determine the manner of disposing of the public lands, and it has the sole power to declare the dignity and effect of titles emanating from the United States.

United States v. Gratoit, 14 Pet. 526, 10 L. Ed. 573.
Bagnell v. Broderick, 13 Pet. 436, 10 L. Ed. 235.
Downes v. Bidwell, 182 U. S. 268, 45 L. Ed. 1099.
Kean v. Calumet Canal & Imp. Co., 190 U. S. 466, 47 L. Ed. 1147.

The United States holds the title to the beds, below high water mark, of the navigable streams within a Territory

for the benefit of the whole people, and in trust for the State or States to be ultimately created out of such Territory.

Shively v. Bowlby, 152 U. S. 1, 28; 38 L. Ed. 331, 342.
Weber v. State Harbor Comrs., 85 U. S. 57, 21 L. Ed. 798.
Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819.
Knight v. United Land Asso., 142 U. S. 161, 35 L. Ed. 974.
San Francisco v. Le Roy, 138 U. S. 656, 34 L. Ed. 1096.
McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95.

In the United States the law does not distinguish between tidal streams and non-tidal streams which are navigable in fact.

McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95.
Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224.
The Genessee Chief v. Fitzhugh, 12 How. 443, 13 L. Ed. 1058.
Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force title to the upland only, or what lies above ordinary high water mark. And such grants do not impair the title and dominion of the future State, when created, to the bed of the stream below ordinary high water mark.

Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.
McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95.
Eldridge v. Tresevant, 160 U. S. 452, 467, 40 L. Ed. 490, 499.

The use of the shores of navigable streams and the right, title or interest of riparian proprietors, or the owners of the upland, to such shores and to the beds of the streams must be determined by the laws of the several States, subject only to the rights vested by the Constitution in the United States.

Shively v. Bowlby, *supra.*
St. Anthony Falls Co., v. St. Paul, 168 U. S. 349, 361, 42 L. Ed. 497, 502.
St. Clair County v. Lovingston, 23 Wall. 46, 68, 23 L. Ed. 59, 63.
Barney v. Keokuk, 94 U. S. 338, 24 L. Ed. 228.
Illinois C. R. Co. v. Chicago, 176 U. S. 646, 660, 44 L. Ed. 622, 627.
Pollard v. Kibbe, 9 How. 471, 13 L. Ed. 220.
Packer v. Bird, 137 U. S. 671, 34 L. Ed. 822.
Scranton v. Wheeler, 179 U. S. 141, 187, 45 L. Ed. 126, 146.
Mobile Trans. Co., v. Mobile, 187 U. S. 479, 47 L. Ed. 266.
Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565.

The Courts of the United States will construe the grants of the general Government without reference to the rules of construction adopted by the States for their grants, but whatever incidents or rights to the soil under navigable waters, or below high water mark, attach to the ownership of the upland conveyed by the Government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use or enjoyment of the property by the grantee.

Shively v. Bowlby, *supra.*
St. Anthony etc., Co., v. St. Paul, *supra.*
McGilvra v. Ross, *supra.*

Snake River in southern Idaho is a navigable stream.

Johnson v. Johnson, 14 Idaho, 561.
Moss v. Ramey, 14 Idaho, 598.

Whether a riparian owner holds title in fee to the center of a navigable stream, or to low water mark or high water mark must be determined by the laws of the state in which the upland is situated.

McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95.
Shively v. Bowlby, *supra.*

The title to the bed and shores of non-navigable streams is vested in the owner of the upland, and where the op-

posite banks of a stream, not navigable, belong to different persons the stream and the bed thereof is common to both.

U. S. Rev. Stat., Sec. 2476.

The owner in fee of the bed of the river, or other submerged land, is the owner of any bar, island or dry land which may be subsequently formed thereon.

St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941.

Title to Islands.

Islands formed in the stream before the admission of the State into the Union are subject to disposal by the Federal Government the same as other public lands. If they are formed after the admission of the State, the question whether they belong to the riparian owner, or are the property of the State, is governed by local law.

1 Farnum on Waters, p. 50.
United States v. Mission Rock Co., 189 U. S. 391, 47 L. Ed. 865.
Mission Rock v. United States, 48 C. C. A. 641, 109 Fed, 763.
Steinbuchel v. Lane (Kan.) 51 Pac. 886.
Shoemaker v. Hatch, 13 Nev. 261.
Granger v. Swart, Fed. Cas. No. 5685.

Public agents cannot bind the Government beyond the terms of the statute under which they act.

Public agents are but servants of the law, and if they depart from its requirements, the Government is not bound.

Moffat v. United States, 112 U. S. 34, 28 L. Ed. 623.
Kirwan v. Murphy, 189 U. S. 35, 47 L. Ed. 698.
Horne v. Smith, 159 U. S. 40, 40 L. Ed. 68.

The failure of a public land surveyor to survey an island of 138.15 acres of high and valuable agricultural land, not subject to inundation or overflow, does not enlarge the title conveyed by the patents to the upland situated across a 400 foot channel from the island.

Horne v. Smith, 159 U. S. 40, 40 L. Ed. 68.
Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171.
Barnhart v. Ehrhart, 33 Ore. 274, 54 Pac. 195.
French-Glenn Live Stock Co., v. Springer, 185 U. S. 47, 46 L. Ed. 800.
Security Land etc., Co., v. Burns, 193 U. S. 167, 48 L. Ed. 662.
Steinbuchel v. Lane, (Kan.) 51 Pac. 886.
Shoemaker v. Hatch, 13 Nev. 261.
Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 882.
In re Peterson, 39 Land Dec. 566.

One receiving a patent for the full acreage of upland paid for will not be heard to insist that, by reason of the failure of the surveyor to note on the official plat the existence of an island of 138.15 acres of agricultural land, not subject to overflow, and situated across a 400 foot channel from the upland, he is entitled to the island also.

Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171.
Horne v. Smith, 159 U. S. 40, 40 L. Ed. 68,
Barnhart v. Ehrhart, 33 Ore. 274, 54 Pac. 195.
Lammers v. Nissen, 4 Neb. 245.
Bissel v. Fletcher, 19 Neb. 725, 28 N. W. 303.
Harrison v. Stipes, 34 Neb. 431, 51 N. W. 976.

An island in existence at the time of the admission of the State into the Union, consisting of 138.15 acres of dry land not subject to overflow and adapted to ordinary agricultural uses, is not part of the *river bed*, and title thereto does not pass by implication or legal intendment to either the State or the riparian owner, but it may be claimed, surveyed and sold by the Government as other public lands.

Mission Rock Co. v. United States, 48 C. C. A. 641, 109 Fed. 763.
United States v. Mission Rock Co., 189 U. S. 391, 47 L. Ed. 865.
In re Peterson, 39 Land Dec. 566.

Steinbuchel v. Lane (Kan.) 51 Pac. 886.
Shoemaker v. Hatch, 13 Nev. 261.

The Government as the original proprietor has the right to survey and sell any lands, including islands in the rivers or other bodies of water; and the failure of the surveyor to show an island on the official plat does not estop the Government from claiming it when its attention is directed to it.

Whitaker v. McBride, 197 U. S. 510, 49 L. Ed. 857.
Horne v. Smith, 159 U. S. 40, 40 L. Ed. 68.
Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171.
Kirwan v. Murphy, 189 U. S. 35, 47 L. Ed. 698.
Bissel v. Fletcher, 19 Neb. 725.
Barnhart v. Ehrhart, 33 Ore. 274.

Jurisdiction of Land Department.

Whether an island is open to homestead entry and settlement, and should therefore be surveyed, is a matter within executive judgment or discretion.

Carrick v. Lamar, 116 U. S. 423, 29 L. Ed. 677.
St. Louis v. Rutz, 138 U. S. 251, 34 L. Ed. 951.
Kirwan v. Murphy, 189 U. S. 35, 56, 47 L. Ed. 698, 705.

The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else.

Lee v. Johnson, 116 U. S. 48, 29 L. Ed. 570.
Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800.
St. Louis Smelting & Ref. Co., v. Kemp, 104 U. S. 636, 26 L. Ed. 875.
Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848.
Baldwin v. Starks, 107 U. S. 463, 27 L. Ed. 526.
United States v. Minor, 114 U. S. 233, 29 L. Ed. 110.
Burfenning v. Chicago, St. P. M. & O. R. Co., 163 U. S. 321, 41 L. Ed. 175.

Johnson v. Drew, 171 U. S. 93, 43 L. Ed. 88.
Moss v. Dowman, 176 U. S. 413, 44 L. Ed. 526.
Gertgens v. O'Connor, 191 U. S. 237, 48 L. Ed. 163.

The Land Department in issuing a patent must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.

Steel v. St. Louis Smelting & Ref. Co., 106 U. S. 447, 27 L. Ed. 226.
Johnson v. Towsley, 13 Wall. 72, 83, 20 L. Ed. 485.
French v. Fyan, 93 U. S. 169, 172, 23 L. Ed. 812.
Quinby v. Conlan, 104 U. S. 420, 426, 26 L. Ed. 800.

A decision rendered by the officers of the Land Department upon a question of fact is conclusive and not subject to be reviewed by the Courts in the absence of a showing that such decision was rendered in consequence of fraud or imposition or mistake other than an error of judgment in estimating the value or effect of evidence, regardless of whether or not it was consistent with the preponderance of the evidence, so long as there is some evidence upon which the finding in question could be made.

Hartwell v. Havighorst, 196 U. S. 635, 49 L. Ed. 629.
Jordan v. Smith, 12 Okla. 703, 73 Pac. 308.
Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398.
Love v. Flahive, 33 Mont. 348, 83 Pac. 882.
Parsons v. Venzke, 4 N. D. 452, affirmed in 164 U. S. 89, 42 L. Ed. 185.
Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424.
32 Cyc, 1020, et seq.
Le Fevre v. Amonson, 11 Ida. 45, 81 Pac. 71.
White v. Whitcomb, 13 Ida. 490, 90 Pac. 1080; affirmed in 214 U. S. 15, 53 L. Ed. 889.

The decisions of the Land Department on the construction of the land laws are entitled to great respect at the hands

of the Court and should not be overruled unless they are clearly erroneous.

United States v. Healy, 160 U. S. 136, 40 L. Ed. 369.
Robertson v. Downing, 127 U. S. 607, 32 L. Ed. 269.
Hahn v. Cook, 29 Nev. 518, 92 Pac. 3.
Lavagnino v. Uhlig, 26 Utah 1, 71 Pac. 1046.
O'Reilly v. Nixon, (Colo.) 113 Pac. 486.

The general rules as to the conclusiveness of decisions of the Land Department apply to decisions of the Commissioner of the General Land Office.

Rutledge v. Murphy, 51 Cal. 388.
Shelton v. Keirn, 45 Miss. 106.
Perry v. O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.
Hartman v. Smith, 7 Mont. 19, 14 Pac. 646.
Parsons v. Venzke, 4 N. D. 452, affirmed in 164 U. S. 89, 41 L. Ed. 360.
Glidden v. Union Pac. R. R. Co., 30 Fed. 660.

Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination.

De Cambra v. Rogers, 189 U. S. 119, 47 L. Ed. 734.

When the Land Department accepted the application of plaintiff in error for a survey of the island in question and directed that said island be surveyed, platted and offered for sale as public land, it held in effect that it had not been the intention of the Government to surrender its title to said island under the patents to defendants in error, or their predecessors in interest, for the fractional lots situated across the channel from the island. And the decision of the department on those questions has become *res adjudicata*, at least so far as the power of that Department extends.

In re Peterson, 39 L. D. 566.
Case v. Church, 17 L. D. 578.
Gowdy v. Gilbert, 19 L. D. 17.
In re Palmer, 26 L. D. 24.
In re Kuhlam, 27 L. D. 68.

The decision of the Land Department that an unsurveyed island, containing 138.15 acres of agricultural land and not subject to overflow, was not included in the patent from the Government for the upland, situated across a 400 foot channel of a navigable river from the island, will be sustained by the Court.

Whitaker v. McBride, 197 U. S. 510, 49 L. Ed. 857.

ARGUMENT.

Accretion and Reliction Rights Not Involved.

The apparent conflict or confusion in the cases involving title to islands, or land beyond the meander line of the Government survey, arises from the failure to distinguish between accretion and reliction rights on the one hand and islands in existence at the time of the admission of the State into the Union on the other.

The question of title to realty formed by gradual and imperceptible increase of land caused by the deposit of earth, sand or sediment thereon by contiguous waters, is not involved in the case at bar; neither does the case involve the question of title to land left uncovered by the receding of water from its former bed; neither does it involve the title to bars or islands submerged during high water, or separated from the mainland only by sloughs or high water channels.

The authorities bearing on the title to land thus formed, or to islands or sand bars thus situated, and the principles of law applicable in such cases have no application to the case at bar.

Title to Land Between the Meander Line and the River not Involved.

The authorities bearing on the title to land situated between the meander line of the Government survey and the water line of the river have no application here. While there is situated in this case a strip of land from 100 to 600 feet in width, between the meander line of the land owned by defendants in error and the East Channel of Snake River, no claim whatever is made to such land either by plaintiff in error or by the Government. It is conceded in this case

that the defendants in error are entitled not only to the land for which they actually paid the Government, and which is specifically described in their patents, but also to whatever lies between the meander line and the river; and that under the laws of Idaho they are entitled to take to the middle thread of the East Channel of Snake River, which channel is approximately 400 feet width and carries a large volume of water during all seasons of the year. This channel is not a slough, or high water channel; it is as permanent in every way as the West Channel of that river, the only difference being that of size, the East Channel being approximately 400 feet and the West Channel about 1000 feet in width.

Most of the decisions involving the title to islands will be found, upon examination, to deal only with shifting sandbars, or islands formed after the State was admitted into the Union, or islands which are entirely submerged during high water and separated from the mainland by a narrow channel carrying water only during the higher stages of the river. The principles controlling the decisions in such cases have no application here.

Facts Regarding Poole Island.

Snake River at the point where Poole Island is situated and for some distance above and below the same, forms the boundary between the States of Oregon and Idaho. The riparian land across the East Channel from the island was surveyed in September, 1868 (see map, trans, p. 50). The township was fractional; the meander line follows the East Channel of Snake River, being from 100 to 600 feet from the water line (trans. p. 26). The township plat does not purport to show all the land in the township, or what lies across the river or in the river, but it does show that the survey extended only to the high water line, and it shows only that part of the township which lies easterly from the water line of the East Channel.

The island was in existence and in substantially the condition it now is when the witnesses who testified in this cause first knew that section of the country. The East Channel of the Snake River is in itself a large river, one that must be meandered by a government surveyor. The usual mode of crossing it is by boat (trans, pp. 21, 34-39).

The Government caused the island to be surveyed in June, 1906, on the application of plaintiff in error, and the field notes of the survey show the character of the island (trans. pp. 30-33).

Among other things, the Deputy Surveyor certifies that "the island is not subject to inundation," (trans. p. 33), and he so testified on the trial of the case. He says (trans. p. 38):

> "The elevation of the island at that time was four or five feet; that is what I made it on my notes, that was June 16, 1906, during high water. I couldn't see any indications that the island had ever overflowed. Compared with the mainland on the east side of the East channel it is more like the Oregon side of the land than it is the Idaho side."

The evidence is uncontradicted that the island has never been known to overflow, and that the East channel has never been known to be dry. The defendant Lattig caused a survey to be made during extreme low water. In referring to that survey, and the map made therefrom, Lattig says:

> "The figures 385 and 370, etc., represent the width of the channel as we found it on December 5, 1905, by actual measurements from the water's edge. The space between the meander line and the water channel as shown on the map represents land. The strip of land between the meander line of lots 1, 2, 3 and 4 and the water's edge as we found it varies from 100 to 500 or 600 feet in width. That lays between the meander line and the water's edge. * * * The figures on the island '1220' between 'Poole' and 'island' represent the width of the island from the water's edge on one side to the water's edge on the other side. Since I have become familiar with this island it has never overflowed. I have seen high water within a foot and a half from the top of the bank. The island is generally what is called smooth, it is about 8000 feet long, and the river has about six feet fall along the length of this island. I cut wood on the island in the winter of

1903-4. The average depth of the West channel varies from three feet to what would swim a horse." (Trans. p. 26).

The same witness, on direct examination by his own counsel, testifying in regard to the depth of water in the East Channel on December 5, 1905, which was during the low water season, says:

> "The first measurement is one foot at the head of the island, the second one foot, about midway down one foot, two-thirds of the way down one and one-half feet, near the lower end two feet, extreme end it is three feet; that is the average depth. We took several soundings across the channel." (Trans. p. 24).

This was the testimony of Lattig himself, testifying in his own behalf. There was no other testimony on this point offered in behalf of Green.

Mr. Scott testified as to the character of the East Channel as follows:

> "The last time I measured it was about the fifteenth of June this year with Dave Lamb. I measured it right opposite the greenhouse. * * * We crossed in one place and measured it three or four times in crossing, and the average depth was from 9 to 14 feet. The shallowest was 9 and the deepest was 14. * * * I have observed the depth at other times quite frequently. I have crossed the channel once or twice a week for three years or more. Crossed it with a boat. Two years ago this coming fall I crossed it in August and September without a boat on horseback, and in September, I think 1905, I waded across; that was the only time. The water was then the lowest I ever saw it; where I waded across was the shallowest place I could find; there were two or three riffles across where I waded. * * * *I have never known the East Channel to go dry; there is no stagnant water there at any time.*" (Trans. pp. 34-35.)

The Government Deputy Surveyor, who surveyed the island, testified as follows as to the condition of the East Channel at the time of the survey:

> "I did not observe the depth of the water in the East Channel. I only tried it in one place with my 10-foot rod, and could not touch bottom. I did not know whether that was the deepest place or not." (Trans. p. 38).

The witness Pearce says:

> "We found it from 9 to 14 feet in depth, as near as we could get at it. The shallowest place 9 and the deepest 14 feet." (Trans. p. 39).

Mr. Scott testifying about the condition of the island says:

> "I think I have been over every foot of the island frequently, except where the brush is so thick I can't get through. I have noticed the conditions of it and the elevation above high and low water, and whether it is subject to overflow or not. It has not overflowed since I became familiar with it. I could find no indications of it having overflowed. It is covered with sage brush and grass, wood and willows, and wild roses and wild grass. There are a few willows or trees on it six or eight inches through. Wood is being cut from off it for fuel. There are stumps there as though a good deal of willows have been cut. The elevation of the island I should judge is close to 10 feet above low water, and three to seven feet above high water. I have a well on it; I drove a pipe 17½ feet deep, that is the way I get water." (Trans. p. 34).

The witnesses all agree that in late years during the late summer season the water has been shallower during extreme low water than it was in former years. This is attributed to the large amount of water now being taken out above the island for irrigation purposes during July, August and September. (Trans. p. 24).

Defendants in Error Were Not Misled by the Government Plat.

The record shows clearly that defendants in error, and their predecessors in interest, were not misled into believing that they would get title to Poole Island by reason of their patents for the riparian land across the channel. The claim which they are now making is merely an afterthought.

The first claimant to the island was one Shell, and he claimed it by right of possession about 1881 or 1882. He had no other land and was an actual occupant of the island (Trans. pp. 22, 23, 41). He sold his right of possession or squatter's right to Mr. Poole about 1883. Mr. Poole took possession of the island, residing on it for a few years, *claiming it solely by right of possession* (Trans. pp. 21, 22, 41). The record shows clearly that the claim made to the island by Shell and Poole, and all claimants prior to Lattig, who does not claim to have acquired an interest in it until July, 1904, was based upon the fact of *possession*, and not upon title from the Government under the patents to the riparian lands.

The administrator of the Poole estate, who conveyed by *quit claim* deed whatever title the estate had in the island to Mr. Lattig, testifying as a witness for Lattig, says:

> "Mr. Shell was the man that owned that island. I don't know how he owned it. He was just living on it. I don't know how long he was in possession. I never heard of him owning any land except the Poole Island. I always considered Mr. Poole owned the island from the fact that he bought it from Mr. Shell, as stated, *that was the source of his title*, that was my understanding. I never thought anything about it, that the land abutting it would hold it across the channel, that was my understanding at any rate. During the time I was administrator I didn't do anything on the island, except to use it as pasture. I couldn't see whether other people used it as pasture during the same period. I never heard of anybody using it for any private purpose." (Trans. p. 22).

Continuing, the witness says:

> "Mr. Poole bought this island from Shell, that is what he informed me. I didn't ask him the date, this was in 1883. Shell owned none of the mainland to my knowledge, I couldn't say how he claimed to own the island, I suppose *just by right of possession.* I couldn't say how long after that Mr. Poole bought the land across the channel on the Idaho side. I always considered Mr. Poole had the best right to the island. He bought it from Shell and always had possession of it. I suppose Mr. Shell moved off the island when he bought him out." (Trans. p. 23).

This same witness says that he never listed the property for taxation because he considered it unsurveyed land, not subject to taxation, and that the Poole estate only had a squatter's right to it; that while he was administrator of the estate from 1898 to 1904 he paid no taxes on the island, and didn't list it with the assessor as taxable property. (Trans. p. 21).

Another witness called in behalf of Mr. Green testified as follows:

> "I knew Mr. Shell. He lived on the island I don't know how long. He was living there, as I remember it when I came to Payette. He left there some time I think from 1881 to 1884, I don't know exactly. Poole bought him out and he moved in. *He had what we call a squatter's claim to the island,* he had a cabin and lived there. *He claimed it by right of possession.* He didn't own any land on either side of the river." (Trans. p. 41).

Lattig claims to have purchased from the Poole estate and to have secured a *quit claim deed* to the island from the estate (Trans. pp. 26, 30), but he also says:

> "There has been no taxes assessed against Poole Island during that time." (Trans. p. 24).

Another witness called on behalf of Lattig testifies (Trans. p. 28) that:

"He (Green) said he never claimed any interest in it, and didn't then. I asked him why if Mrs. Poole could own part of the island he could not, he said Mrs. Poole owned the island and had owned it for some time and that he didn't own it. I believe he said there was some mineral right or something like that, I don't remember just what, it was a long time ago; that they had owned the island a long time ago. I guess he said she owned it by virtue of a mineral location. I don't remember the year he said that mineral location was made; he said they had owned it a long time. This conversation was had some five or six years ago."

Upon cross-examination the same witness said:

"I said Mr. Green told me Mrs. Poole owned it. I believe through some mineral locations that had been made there; that is what he said. Mr. Poole made the mineral locations and Mrs. Poole as a widow succeeded to his rights to the locations. I don't know when the locations were made. I didn't understand whether the whole island was covered by these locations or not. That, as I understand it, *was the source of their titles as claimed by Mr. Green.* I do not remember much about what Mr. Green said as to the source of Poole's title. He said Mrs. Poole owned it and he did not claim it."

And another witness called on behalf of Mr. Green says, (Trans. p. 41):

"We prospected all over the island in 1893, just after the Chicago fair, in the winter and probably the next spring. Mr. Poole prospected also, he was with us. I don't know what constituted the company. A man named Cammet and myself and an expert I got down there and Sam Poole; Green was not with us. *That was after Sam Poole had proved up on his place, he had not received his patent then, but he may have proved up a year or so before.* We organized a kind of company and located 240 acres on the island and extended into the river, that is what

we recorded; that was Sam Poole and myself and associates; we had different names in it to fill up the number; we each had twenty acres. Sam Poole was one of these men. As to how long Poole and I continued to prospect, we simply located and recorded it, but never worked the assessment on it. We located the entire island—240 acres. The locations were made after the Chicago fair during that winter and it might have been that we were on the Poole Island pretty well towards spring. We made the location 1893 to 1894. When I say we didn't do the assessment work I mean the annual assessment work."

It is clear, therefore, that until about the time of the commencement of this action no one claimed title to the island under the patents which had been issued for the riparian land across the channel or by virtue of the ownership of such land. With these facts established, and so far as we know they are uncontradicted, we will examine the legal questions involved.

Poole Island Has Been Surveyed and Claimed by Government.

It is important to note that when the attention of the Government was called to the existence of Poole Island it immediately laid claim to it and caused a survey thereof to be made, and offered it for sale as other public lands. The courts have frequently held that as between the riparian owner and a mere intruder or trespasser, the right of the former would be sustained where the Government had declined to survey the land or lay any claim to it after its attention had been directed to it.

The law on that subject was clearly stated by this court in Whitaker v. McBride, 197 U. S. 510, 49 L. Ed. 857. The court there said:

> "It must also be noticed that the Government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island, or of the rights which would result in case it did make such survey. * * * Our conclusion, therefore, is that by the law of Nebraska, as inter-

> preted by its highest court, the riparian proprietors are the owners of the bed of the stream to the center of the channel; *that the Government, as original proprietor, has the right to survey and sell any lands, including islands in the river or other bodies of water;* That if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof no citizen can overrule the action of the Department, assume that the island ought to be surveyed, and proceed to occupy it for the purpose of homestead or pre-emption entry. In such a case, the rights of the riparian proprietors are to be preferred to the claims of the settler." (Our italics.)

The rule stated above has been accepted by the Land Department, and is now being followed in the survey of islands. It was under that decision that the Land Department acted in surveying Poole Island. The Secretary of the Interior in the recent decision in the application of Emma S. Peterson, 39 L. D. 566, for the survey of an island in Snake river in the State of Idaho, containing only 55 acres, reviews the authorities on the subject and declines to follow the decision of the Idaho Supreme Court in the case at bar. He shows clearly that the decision of the Idaho Court in this case, is contrary to law and to the doctrine laid down by this Court and followed by the Land Department.

After quoting from the decision in Whitaker v. McBride, *supra*, the Secretary says:

> "Here was a direct holding that the power to survey islands lying between the meander line and the center of a stream, existing at the date of the survey and the admission of a State into the Union and left unsurveyed, remains with the general Government, which may or may not exercise its pleasure with reference to the survey of said lands, and that no one can complain of it."

After referring to certain erroneous conclusions of the Idaho Court, in the case at bar, the Secretary says:

"In that view the court concludes that 'it is only where the physical facts and circumstances rebut the legal presumption that the Government intended to part with title to the land in question that the court will recognize a further conveyance.' The court, in Grand Rapids & Ind. R. R. Co. v. Butler, and in United States v. Chandler-Dunbar Co., applied the rule conversely and held that where the islands are so insignificant in area as to be of no apparent value, mere 'rocks rising very slightly above the level of the water,' the presumption arises that the surveyor declined to survey the 'particular strip as an island,' and hence they were not excepted from 'the admitted transfer to the State of the *bed of the stream* surrounding them.' No expression occurs in either case that sanctions, or intended to sanction the ruling announced by the court in Lattig v. Scott, or to hold that any estate passed to the riparian proprietor by virtue of his grant from the government other than the bed of the stream.

"The island in question is said to contain 55 acres, 15 acres more than an ordinary legal subdivision, and of sufficient area to rebut any presumption that it passed to the State, upon its admission into the Union, as a part of the bed of the stream."

Attention is again called to the fact that the island in the case at bar does not contain only 55 acres, as did the one before the Department in the case cited above, but it contains *138.15 acres*. And we respectfully submit that there is not one case recorded where an island of that area, or of even half that area, separated from the mainland by a 400-foot channel or half that width, carrying a large volume of running water during all seasons of the year, not subject to overflow, and in existence at the time of the admission of the State into the Union, has either by the Land Department or the courts, been held to be the property of the riparian owner, or as having passed by intendment or implication under a patent for the riparian land across the channel.

In the case at bar the island was claimed by the Government. It was surveyed, and it was entered by plaintiff

in error under the homestead laws, and we may add that since the trial of the case patent therefor has been issued and delivered to Scott.

Title to Islands and Land Under Water.

In view of the fact that the evidence is uncontradicted, in fact it is conceded by all parties, that the island in question does not overflow and is not subject to inundation during even the highest stages of the water, it may seem unnecessary to discuss the law as to the ownership of beds of streams and shores of navigable waters, but we apprehend that substantially all cases that will be cited by opposing counsel will involve shifting sandbars and islands that are submerged during high water and separated from the mainland by either sloughs or high water channels which are entirely dry for a long period each year. We shall, therefore, consider generally the laws as to the ownership of islands.

Whence the island came, whether it arose from the bed of the stream or was cut off from the mainland, whether it was formed at the time the mainland was formed, or ages thereafter, is wholly immaterial. The fact remains—conceded by all—that it was in existence and in its present condition long prior to the admission of the State of Idaho into the Union, and, that being established, it follows as a logical sequence from the application of simple but fundamental rules of law, that the island is not the property of the riparian owners, and that the judgment of the Supreme Court of Idaho must be set aside.

Upon the acquisition of a territory by the United States the title and dominion of lands *under* the navigable waters therein, passes to the United States, for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory.

Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.
McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95.

The proposition stated above is fundamental and there are no divergent or conflicting cases on that point. It is equally well established that the title to the land not covered by navigable waters, and the title to the soil under non-

navigable waters is taken and held by the United States to be surveyed and disposed of under the public land laws.

Section 2476, U. S. Revised Statutes.
Section 2395, U. S. Revised Statutes.

It is equally fundamental that the new States admitted into the Union and formed out of territory formerly held by the United States, take, upon their admission, the title to the soil *under* the navigable waters formerly held in trust for them by the United States, subject to the public right of navigation and subject to such control and regulation as may be vested in Congress by the Constitution.

Cases cited *supra*, and under "Points and Authorities" in the fore part of the brief in support of this proposition.

A state, upon its admission into the Union, may determine by its local law whether it will hold the title to the beds and shores of the navigable waters or vest the fee thereof in the riparian owners.

Shively v. Bowlby, *supra*.
St. Anthony Falls Co. v. St. Paul, 168 U. S. 361, 42 L. Ed. 502.
McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95, and
Cases cited in the fore part of this Brief under "Points and Authorities" in support of this proposition.

It is equally well settled that the owner of the bed of the river or other submerged land, is the owner of any bar, island or dry land which may be subsequently formed thereon.

St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941.

It must also be conceded by all, in fact it would be a palpable inconsistency of terms to hold otherwise, that an island of 138.15 acres, not subject to overflow or inundation during even the highest stages of the river, is not part of the bed of the stream. It is a settled principle of law that islands formed in the stream before the admission of the

State into the Union are subject to disposal by the Federal Government, the same as other public lands, for it is only the *bed* of the stream that passes to the State. If islands are formed after the admission of the State, the question whether they belong to the riparian owner or are the property of the State must be settled by the law of the State.

1 Farnham on Waters, p. 50.

This identical question was before the Circuit Court of Appeals of the Ninth Circuit in Mission Rock Company v. United States, 48 C. C. A. 641, 109 Fed. 763. In that case the islands were insignificant in size as compared with the one now before the Court. But the islands in that case consisted partially of what is known as "made" land and partially of islands which had been in existence before the State was admitted into the Union. The court held that the Government had never parted with its title to the islands which projected above the water at the time California was admitted as a State, but that the "made" land adjoining the islands belonged to the person who deraigned title from the State of California to the soil or tide land, upon which the "made" land rested. The court said:

> "Upon the facts appearing, we are of the opinion that the United States is not entitled to recover from the defendant any of the submerged land included in the grant from the State of California to the predecessor in interest of the defendant. We are further of the opinion, however, that the grant *did not include the two rocks or islands above mentioned, for the reason that neither of them ever passed to the State.* They no more constituted submerged land than did the island of Alcatraz, also situated in the bay of San Francisco, upon which the Government has erected and now maintains important fortifications. That island, it is true, is much larger than the larger of the two islands or rocks here in controversy; the island of Alcatraz being about 600 yards long by about 260 yards in breadth, and rising to an elevation of 137 feet above the bay. Like the two islands in controversy, however, it is composed

almost entirely of rock. Pacific Coast Pilot, 182. The relative size, however, of the rocks or islands does not change their legal character. *Neither of them is submerged, and all alike project above the surface of the bay, and do not, and never did constitute any part of the submerged or tide lands which passed to the State.*" (Our italics).

The decision of the Circuit Court of Appeals above referred to was affirmed by this Court in 189 U. S. 391, 47 L. Ed. 865. The reasoning of the court is not only persuasive but it is convincing and conclusive. The doctrine upon which it rests is fundamental, and the decisions upon the question cannot be harmonized upon any other doctrine. Reduced to its simplest form, the doctrine may be stated thus:

A riparian owner along a navigable stream takes title under his patent from the Government to high water mark. Whether he shall have any title to the soil below high water mark depends upon the law of the State. In some States the law vests in the riparian owner title from the high water line to the low water line, and in other States, like Idaho, the local law vests in the riparian owner title to the soil under water to the center of the stream. A riparian owner, therefore, in the State of Idaho, deraigns his title from two sources: From the Federal Government he takes title to the high water line, under his patent for the upland, and from the State he takes title to what lies under water from the high water line, where the Federal grant terminates, to the center thread of the stream.

The title which the State passes under its local law to the riparian owner is the title which it received, on its admission into the Union, from the Federal Government. That is to say, *it is the title to the bed of the stream, which the United States, during the territorial period, held in trust for the future State under the doctrine announced in Shively v. Bowlby, supra, and other cases heretofore cited.*

Applied to the facts in the case at bar, it necessarily follows that the patents to Poole and Green for the riparian land opposite the island, passed title in fee from the general government to the patentees therein named, to the high water line of the East Channel. The Government, after the

State was admitted into the Union, which was on July 3rd, 1890, had no title to any part of the channel below the high water line. Whatever title or right the patentees of the riparian land have to the land or soil below the high water line of the East Channel they must deraign through the State of Idaho under the general laws of that State, which vest the fee in the riparian owner on a navigable stream, to the center thread of the stream.

It is obvious, however, that the *State could not pass title to the island in question* to a riparian owner or anyone else. *for the State itself had no title to, or right or interest in the island.* It was not a part of the *bed* of the stream when the State was admitted into the Union, and it did not, therefore, pass to the State any more than did the other unsurveyed public lands in that State. The question is identical with that before this court in United States v. Mission Rock Co., 189 U. S. 391, 47 L. Ed. 865.

What is the source of the title of defendants in error to Poole Island? There is no answer to the question, for the simple reason that they have no title to the island. They could not have deraigned it from the State for the reasons stated above; they did not deraign it from the Federal Government under the patents to the fractional lots of upland across the channel, for those lots could under no legal doctrine, or upon any legal principle, extend further than to the high water line of the East Channel. The island in question and the upland claimed by defendants in error *are separated by a 400-foot channel, to which the United States had no title whatever when the patents were issued to defendants in error, or their predecessors in interest.*

Construction of Grants by the Government.

The rule as to boundaries marked by a meander line represented as following the sinuosity of a body of water is not absolute or inexorable. It is like any other rule where there is a conflict between distances and courses and natural monuments referred to in the conveyance. It is founded upon the presumed intention of the parties, to be gathered from the language contained in the grant, and upon the assumption that the description by monuments approaches accuracy within some reasonable distance, and places the monument somewhere near where it really ex-

ists. In applying this rule the difference between the construction of grants by the sovereign and grants by private parties must also be considered. The grants of the Government are to be strictly construed in its favor and against the grantee. In other words, nothing passes by the grant of the Government but that which is necessarily and expressly embraced in its terms. The rule was stated by this court in Shively v. Bowlby, supra, where it was said:

> "It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and the emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away. * * * Many judgments of this court are to the same effect." (citing):
>
> Chas. River Bridge v. Warren Bridge, 11 Pet. 420, 544-548, 9 L. Ed. 773, 822-824.
>
> Martin v. Waddell, 16 Pet. 367, 411, 10 L. Ed. 997, 1013.
>
> Cent. Trans. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 49; 35 L. Ed. 55, 64.

It should be noted also that no authority has been conferred by Congress on any department of the Government, or any official *to convey or transfer from the Government unsurveyed public land.* The limited authority of public agents should also be considered. In the case at bar, the Supreme Court of Idaho in effect held that the failure of the

Government surveyor to mention the island in his notes, or to note it on the plat, was practically conclusive evidence that the Government did not intend to claim the island or to sell the same separately, but to pass it as an appurtenance or incident to the lands across the channel, described in the patents to the riparian owners.

Public Agents Cannot Bind the Government Beyond the Terms of the Statute Under Which They Act.

The Congress alone has, under Art. IV, Section 3 of the Constitution, the power to determine the manner of disposing of the public lands of the United States. It has by general and special laws prescribed the terms and conditions upon which the public lands shall be disposed of, and the muniment of title to be given the purchaser; and it has delegated certain authority in the premises to officers of the Land Department.

Public agents are but servants of the law, and if they depart from its requirements the Government is not bound. They cannot bind the Government by acts outside of and in violation of their authority, or in violation of the statutes under which they act. This is fundamental and it is unnecessary to cite but a few of the leading cases.

Mr. Justice Field, speaking for the court in Moffat v. U. S., 112 U. S. 24, 28 L. Ed. 623, said:

> "The position that, as the frauds charged were committed by officers of the United States, the court erred in not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one. The Government does not guarantee the integrity of its officers nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but servants of the law and, if they depart from its requirements, the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties as though performed in compliance with it."

Chief Justice Fuller, speaking for the court in Kirwan v. Murphy, 189 U. S. 35, 47 L. Ed. 698, said:

> "The administration of the public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute (citing authorities). The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the Government, and the Land Department, charged with the duty of surveying the public domain, *must primarily determine what are public lands subject to survey and disposal under the public land laws.*" (Our italics).

Mr. Justice Brewer, speaking for the court in Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171, and referring to the right of the Government to correct its surveys and dispose of land not shown on the original plat and situated beyond the meander line as run by the former surveyor said:

> "It may be that Surveyor Rice erred in not extending his surveys into the marsh, *but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections.* The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor, more land was bought than was paid for, or than the Government was offering for sale." (Our italics.)

The Government has never hesitated to cause re-surveys to be made when it has been convinced that substantial error had been made in the former survey, and its right to do so has been sustained by the courts.

> Horne v. Smith, 159 U. S. 40, 40 L. Ed. 68.
> Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171.

Barnhart v. Ehrhart, 33 Ore. 274, 54 Pac. 195.
French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. Ed. 800.
Steinbuchel v. Lane (Kan.), 51 Pac. 886.
Shoemaker v. Hatch, 13 Nev. 261.
Security Land etc. Co. v. Burns, 193 U. S. 167, 48 L. Ed. 661.
Lammers v. Nissen, 4 Neb. 245.
Bissel v. Fletcher, 19 Neb. 725.

In Niles v. Cedar Point Club, *supra*, it was contended that as the Government plat represented the meander line as bordering on a body of water, the entryman of the fractional lot within the meander line took title to all land lying between the meander line and the water line, notwithstanding it was some distance from the meander line to the water's edge. But the court said:

> "There is no such magic in a meander line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian Reservation."

Courts have generally held that where the meander line is within a reasonably short distance from the water line, the riparian owner shall be entitled to take to the water line; in other words, in such cases monuments have prevailed over courses and distances, and the entryman has been held entitled to the benefit naturally accruing to land bounded by a water course. This rule recognizes the fact that an entryman cannot determine the exact location of the meander line without a survey, and where the distance to the water is not so great as to put him on notice that the meander line does not in fact follow the sinuosity of the stream, the natural monuments will prevail over courses and distances, otherwise the entryman would be misled to his prejudice.

This rule, however, has never been applied where it appeared that the entryman must have known when he entered the land that the survey was incorrect, and that the water line was not where it was represented on the plat as

being, or that there was a body of unsurveyed land beyond the meander line. It was so ruled in Horne v. Smith, Niles v. Cedar Point Club, and in French-Glenn Live Stock Co. v. Springer, heretofore cited. In those cases, and many others of that kind, the entryman was denied absolutely the advantage of access to the water, and the right to take to the natural monument or water line represented on the Government plat as bounding the land entered. It should be noted, however, that no injustice whatever can result to the defendants in error in the case at bar. While the meander line is from 100 to 600 feet from the water line, yet the right of defendants to take to the water line is conceded, and they have all the advantages of the boundary of a large river 400 feet in width, and carrying a large volume of running water during all seasons of the year.

In Horne v. Smith, this court, speaking through Mr. Justice Brewer, after reviewing the facts, said:

> "These considerations are conclusive that the water line which was surveyed, and made the boundary of the lots, was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and between it and the main body of the Indian river. It is unnecessary to speculate why it was that it was not surveyed. It may have been a mere oversight, or it may have been because the surveyors thought that the action of the water would soon wash the low land away; but, whatever the reason, the fact is obvious that no survey was made of that body of land, and the boundary line fixed was the water line of the bayou. * * *
>
> "*Although it was unsurveyed it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it.* Cases of this nature are naturally few in number. * * *"
> (Our italics.)

The observations of Mr. Justice Brewer in Niles v. Cedar Point Club are also pertinent. It was there said:

> "One receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor, more land was bought than was paid for or than the Government was offering for sale."

It should be noted also that the plat on the old survey does not purport to show the entire township. The surveyor only pretended to survey down to the high water line (see map, Trans. p. 50), and there can be no claim by defendants in error that they or their predecessors in interest were in any way misled by the plat, for the existence of the island was there long before they entered their riparian land; and they also knew that it was not shown on the plat and that the Land Department must, therefore, be in ignorance of the existence of the island. They did not call the attention of the Department to it, and made no inquiry to ascertain whether the Government made any claim to the island; and the size and character of the island was such that no person had the right to assume that the government intended to give it as a prize or bonus to those who purchased the riparian fractional lots separated from the island by a river 400 feet in width, and by a strip of upland from 100 to 600 feet in width between the river and the meander line. It is not necessary for defendants in error to go outside of the meander line in order to secure the full acreage for which they paid the Government.

Jurisdiction of Land Department.

Whether an island is open to homestead entry and settlement, and should therefore be surveyed, is a matter within executive judgment or discretion.

> See cases cited in support of this proposition under "Points and Authorities."

It is settled law that the Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else; and the decisions of the Land

Department on the construction of the land laws are entitled to great respect at the hands of the courts, and should not be overruled unless they are clearly erroneous. And the general rule as to the conclusiveness of decisions of the Land Department applies equally to the decisions of the Commissioner of the General Land Office and the Secretary of the Interior.

On these propositions there is no conflict among the authorities. Some of the leading cases on these questions are cited under "Points and Authorities" and we deem it unnecessary to repeat them here.

In the case at bar, the Land Department when its attention was called to the island, caused it to be surveyed and offered for sale. In doing so it necessarily decided that it had not been the intention of the Department to convey it under the patents to the riparian land, and that it was still unsurveyed public land, subject to its jurisdiction. These questions have become *res adjudicata* in the Department.

The Secretary of the Interior, in discussing this matter in Case v. Church, 17 L. D. 578, said:

> "The question as to whether the land in controversy is, or is not, the property of the United States Government became *res adjudicata*, so far as the power of this department extends, when it was ordered sold by the Secretary of the Interior."

And in Gowdy v. Gilbert, 19 L. D. 17, the Secretary had before him the same question, and it was there held, quoting from the syllabus:

> "A final decision of the Department directing a survey of a tract of public land, precludes the subsequent consideration of a claim thereto, based on a riparian ownership."

Since the decision of the Idaho Supreme Court in the case at bar the Land Department has again had the question before it in the case of Emma S. Peterson, 39 L. D. 566. The Secretary declined to follow the Idaho Supreme Court, and showed clearly that the decision of the Idaho Court was in conflict with the decision of this court in United States v. Mission Rock Co., 189 U. S. 391; Shively v. Bowlby, 152

U. S. 1; St. Louis v. Rutz, 138 U. S. 226; Horne v. Smith, 159 U. S. 40; Whitaker v. McBride, 197 U. S. 510, and other decisions of this Court and of State Courts.

The Idaho Court attempted to distinguish the decisions of this Court in the Mission Rock case and in Shively v. Bowlby on the ground that they dealt with tide waters, and that a different rule would obtain in navigable fresh water streams. But there is no such distinction.

Counsel for appellant in McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95, attempted to distinguish those cases on the same ground, but this Court held that there was no such distinction and that that fact had been so conclusively established by rejected decisions of this Court that it could not even serve as the basis for Federal jurisdiction, as involving a Federal question not finally settled. And this court declined to take jurisdiction of that case for the reasons stated above. That the rule laid down in Shively v. Bowlby, The Genesee Chief, the Mission Rock case and other cases along the same line, apply to navigable fresh water streams as well as to tide waters, is no longer an open question.

Review of Cases Upon Which the Idaho Court Based Its Decision.

We believe the Idaho Court failed to grasp the legal principles applicable to the facts in this case, and failed to note the vast distinction between the rules applicable in this case and those applicable in cases where land is formed by accretion or reliction, or islands formed after the State has been admitted into the Union, or islands which are subject to overflow during high water, and which are separated from the mainland by high water channels or sloughs which are dry during a long period each year. An examination of the cases upon which it bases its decision shows that there was no discrimination made in the application of cases. But cases, which have no bearing on the questions involved, were cited in support of the court's decision.

Butler v. Grand Rapids R. R. Co., 85 Mich. 246, 159 U. S. 87, is considered a leading case on this matter by the Idaho Court. An examination of the case shows that the facts in that case do not bring the case within the legal doctrine upon which the present case must be decided, and the decision there has no application to the case at bar. The island

there involved consisted of only 2.56 acres. The channel was from 75 to 100 feet in width, but it *was entirely filled in* at the time of the trial so that there was in fact no island; what had formerly been called an island was at the time of the trial directly connected with the mainland. The mainland was surveyed in 1831, and the four other islands in the river at that point were surveyed in 1837, but the insignificant island in dispute was not surveyed until 1855, or eighteen years after the state was admitted into the Union. The surveyor's notes from the survey of the other four islands, show that the so-called island in dispute was in 1837, or *at the time the State was admitted into the Union*, only a sandbar, and was evidently omitted from the survey when the other islands were surveyed for the reason that it was not considered as either permanent or as having any value.

The decision of the Michigan Court in the above case was based upon Weber v. Pere Marquette Boom Co., 62 Mich. 626, which dealt entirely with a lake front that was completely covered by water but which under some pretense or for some reason had been surveyed. The court in that case said:

> "To give the Commissioner jurisdiction to act, two facts must exist: (1) there must have been an island which was omitted from the surveys when the adjacent territory was surveyed; (2) the land must not have been previously conveyed by the United States. The evidence returned in the record shows conclusively and without contradiction that no island upon Section 26 was omitted from the survey made by the United States in 1838; that no island existed, nor now exists, where the plat, offered in evidence by the plaintiff, represents that there is an island.
>
> "An island is a body of land surrounded by water. The premises described in plaintiff's declaration and in his patents is a body of land covered by water. To call this submerged fen an island is a palpable misnomer."

As stated above, the Butler case was based upon the Weber case, and it is apparent that the rules applicable in

those cases could have no application to the case at bar. The other cases cited in the Butler case are no more pertinent than is the Weber case.

Middleton v. Pritchard, 4 Ill. 510, was also cited in the Butler case, but the doctrine controlling that case is wholly inapplicable here. In that case the court said:

> "The island or peninsula is separated from the mainland by a slough, formed by a gradual slope from each side, through which the water of the river runs two or three months in the year. The mainland is overflowed in high water. In low water the slough is dry, except some pools of standing water; and is filled with drift wood. The timber on the island and the mainland approach within two or three rods of each other; part of the bed of the slough produces grass * * *. It appears the surveyor of the Government traced the courses and distances along the margin of the slough, not the mainland, in order to estimate the quantity of land in the fraction; and which estimate did not include the *locus in quo*."

There had been no survey of the so-called island; and as between a mere intruder, who did not connect himself with the Government title in any way, and the owner of the adjacent land, the latter was held to have the better title.

Hardin v. Jordan, 140 U. S. 371, and Mitchell v. Smale, 140 U. S. 406, can have no application here. These cases dealt with lake beds which were covered by water at the time the State was admitted into the Union, and an attempt was made to entirely deprive the riparian owner of his water frontage, or access to the water. The court simply held that the riparian owner was entitled to take to the water's edge, and as the water receded he was entitled to the land left bare and dry, under the well settled rule governing reliction rights. Those cases were determined under the law governing reliction rights, and not under the law governing the title to islands in existence at the time of the admission of the State into the Union, and not subject to overflow.

Whitaker v. McBride, 197 U. S. 510, is not in point on the question to which the Idaho Court cites the case. In that

case the Government had repeatedly refused to survey the island. The Land Department therefore held that the land in dispute was not public land, and the Court simply held that, as between a mere intruder and the riparian owner, the title of the latter would be sustained until the Government should lay claim to the land and cause it to be surveyed and offered for sale.

Chandos v. Mack, 77 Wis. 573, involved an island containing between two and three acres. It was about 1250 feet long and from 70 to 300 feet in width. The court in its opinion said:

> "It is separated from the west bank of the river by a narrow channel or slough, which varies in width from 95 to 100 feet. * * * It is not overflowed in ordinary freshets, but *is substantially submerged* in extraordinary floods. * * * There is nothing which tends to show that the Government intended to reserve the island as part of the public domain. The island is referred to in the field notes as the meander line, but it is not surveyed, though its location is marked upon the plat of the surveys, so the fact of its existence was not overlooked by the agents of the government when such surveys were made."

The island, being submerged during flood times, is properly a part of the bed of the stream, and goes to the riparian owner in states where the riparian owner takes to the center of the channel. It is separated from the mainland only by a slough, which apparently goes dry during low water.

The other Illinois cases cited in the opinion deal with accretion lands, formed after the adjacent lands had passed into private ownership; such lands belong to the owner of the land to which they are added, and the principles controlling those cases have no application here.

St. Paul etc. R. R. Co. v. Schurmier, 10 Minn. 99, 74 U. S. 272, has been frequently cited in cases of this kind. An examination of that case will show that the principles controlling the decision there have no application to the case at bar. This court says in its opinion in that case:

> "When the water in the river was at a medium height, there was a current in the channel between

what is called the island and the bank, where the meander posts were located, but when the water was low there *was no current in that channel*, and when the water was very high in the river, *the entire parcel of land, designated as the island, was completely inundated.*" (Our italics.)

The evidence also showed that the City of St. Paul had filled in the so-called channel and extended its streets over and across the so-called island to the wharves and landings which had been established on the river side of the island. The court held that it was not public land, but was the property of the riparian owner, as it lay below high water mark, and in the State of Minnesota the riparian owner along a navigable stream holds title to the strip between high water mark and low water mark. The fact that it was entirely submerged during high water, and that the channel between it and the mainland was entirely dry during low water, and that it was insignificant in size and had been appropriated by the City of St. Paul and used for many years, and that valuable improvements had been established on it, take the case out of the principles applicable to the case at bar.

Gould in his work on Waters, Section 77, in referring to this case, says:

> "The question was as to the title to an island in the Mississippi river, which at the time of the survey was a mere sandbar about 95 feet wide and 160 feet long, separated from the mainland by a slough or channel 28 feet wide. The island was submerged in high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main river. At the time of the action, the sandbar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction and the railroad company, which claimed the bar under a new survey made by the United States surveyor and the Congressional grant of certain odd numbered sections. It was held that the sandbar was included in the first survey as part of the mainland."

The case of Jeffries v. East Omaha Land Co., 134 U. S. 178, deals entirely with accretion rights. The case of St. Louis v. Rutz, 138 U. S. 226, involved an island in the Mississippi river formed long after the admission of the State into the Union. The only question there before the court was as to who was the owner of the bed of the river upon which the island was formed, and the court determined the ownership of the island under the rule heretofore cited, that the owner of the bed of a river or other submerged land is the owner of any bar, island or dry land which subsequently may be formed thereon.

The Idaho Court in its opinion (Trans. p. 57) refers to Lattig's Exhibit "D" and to the fact that one D. A. Utter had assisted in making the survey from which the map was made, and special importance is expressly attached to that map because the court says (apparently taking judicial knowledge of the fact that Mr. Utter has since been appointed Surveyor General of the State of Idaho), and that he, or some one, the record does not show who, had written the word "slough" on that portion of the map purporting to represent the East Channel of Snake river. The Court, however, failed entirely to note *that the map was admitted in evidence with the word "slough" stricken out wherever it appeared on such map* (Trans. p. 24), for the reason that it was palpably incorrect to designate the East Channel as a slough; and while the record does not show who had placed it on the map, it is apparent, and was apparent to the trial court, that it had been done solely for the purpose of misleading the court. The evidence is uncontradicted, in fact it appears from Lattig's own testimony, and the Idaho Court so states in its opinion (Trans. p. 57), that the East Channel has a fall of six feet from the upper end to the lower end of the island, or a distance of 8000 feet, which shows conclusively that to designate such channel as a slough would be solely for the purpose of prejudicing the case against plaintiff in error. There could be no stagnant water in that channel, and the record is uncontradicted, as we have heretofore shown, that the East Channel carries a large volume of water during all seasons of the year, is never dry, and the water never stagnant, and that the usual mode of crossing it is by boat, it being only occasionally that it can be crossed in any other mode (Trans. pp. 21, 26, 34-39).

Mr. Utter was not a witness in the case, and to attach any special importance to the fact that he had, while in private practice, assisted Mr. Lattig, who is also an engineer, in making a survey, and that he had certified to the map referred to above is wholly unwarranted.

The court in its opinion (Trans. p. 62) refers to instructions to surveyors and to the inspection of surveys by the Government for the purpose of verifying the correctness of the original survey and determining whether the surveyor has complied with the terms of his contract and done his work faithfully and accurately, and the court adds:

> "After the report of such inspector goes in the Government either approves or refuses the survey and the notes and plats thereof."

We respectfully submit that there is not a word of testimony in the record bearing upon the manner of executing government surveys or examining or inspecting such surveys or reporting thereon to any department. None of these matters were touched upon during the trial, and we do not know from what source this information was received by the court. While the course stated may be followed by the Department at the present time, we respectfully submit that it was not the course followed in 1868 when the original survey was made of the riparian land owned by defendants in error. Prior to April 17, 1879, it was not the practice of the Land Department to require any specific approval by the Commissioner of either the surveys or the plats, but when the township plats had been prepared by the Surveyor General they were by him filed with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States, without any action on either the surveys or the plats by the Land Department proper, or by the Commissioner, or the Secretary.

Tubbs v. Wilhoit, 138 U. S. 134, 34 L. Ed. 887.
Road v. Wallace, 109 Ia. 5, 79 N. W. 449.

We think the law in this case is correctly stated in the dissenting opinion of Chief Justice Sullivan (Trans. pp. 66-68), and that is the view that has been taken of this decision by the Honorable Secretary of the Interior.

In re Emma S. Peterson, 39 L. D. 566.

Decisions by Other State Courts.

No decision can be found from any court, either State or Federal, holding the riparian owners entitled to an island of the size or character which we have in the case at bar. As heretofore stated, in the few cases where islands have been decreed to the riparian owner, they have either been shifting sandbars, submerged during high water, containing only a few acres, or they have been entirely formed after the State was admitted into the Union. No case can be found involving litigation of an island of the size and character which we have in this case. It seems to have been everywhere conceded that such islands were subject to the disposal of the general government, as other public lands, and that no claim could be thereto because of the ownership of riparian land situated across a 400 foot channel from the island.

The case of Shoemaker v. Hatch, 13 Nev. 261, is directly in point. In that case both the island and the river were much smaller than they are in the case at bar. We quote at length from that decision, as it very properly distinguishes or shows the inapplicability of the case of St. Paul etc. R. R. Co. v. Schurmeir, which was cited by the Idaho Supreme Court in support of its decision. The Nevada Court said:

> "Respondents claim that the northern or main channel alone can be considered as the river channel, and that what has been called an island, although surrounded by running water at all ordinary stages of the river, is not an island, but is part of their land lying between the meander line of the survey and low water mark. To sustain this position they cite and rely upon the case just referred to (St. Paul & Pac. R. R. Co. v. Schurmier, 74 U. S. 272), which in many respects was extremely like this case. There are, however, essential points of difference. The river there in question was the Mississippi, and the island, so to call it, was at the time of the survey a mere sandbar about ninety feet wide and one hundred and sixty feet long, separated from the main land by a channel or slough twenty-eight feet wide. The slough in that case was absolutely as large as

the south channel of the Truckee in this case, but relatively to the stream, the main Mississippi River, it was extremely insignificant; the island was a mere sandbar, entirely submerged in high water, and of insignificant size in low water. No notice was taken of it in making the survey, the meander line being run on the land side of the slough. The purchaser of the adjoining fraction claimed the bar; it was filled in so as to raise it above high water, used as a landing for steamboats before and after it was filled in, and covered with valuable improvements. After all this a railroad company procured a new survey to be made by a United States surveyor and undertook to claim the land (then increased to nearly three acres in size and immensely enhanced in value) under a Congressional grant of certain odd numbered sections. On the facts of the case it was decided that the bar was included in the first survey as a part of the main land. But here the facts are different. The two branches of the Truckee River are both permanent, well defined channels. The northern is the shorter, and necessarily has more fall, and in low water carries all the running water, but there is no disparity in the size or appearance of the channels, and the land between is not an insignificant little sandbar, overflowed in high water and liable to be cut away by a change of the current. It is truly an island, and, compared with the size of the stream, a large island. A glance at the map shows to a demonstration that the intention of the surveyor was to meander the southern channel, and not to include the land north of it on the subdivisions purchased by Haydon. To allow the claim of respondents would give them only about two acres of the west end of the island as a part of the fractional subdivision containing ten or fifteen acres, but by the same rule the owner of the next fractional subdivision on the east, which contains not more than five or six acres, would take as parcel of his purchase about eight acres of the island. This shows to what absurd consequences it would lead if the case of The Railroad Company v. Schurmeir was

held to establish the principle that where a river has two channels, one of which ceases to flow at low water, land surveyed as bounding upon that channel will take all the land between it and low water mark on the main channel. As before remarked, that case was decided on its own pecular facts, and no general principle applicable to this case can be extracted from it except that the watercourse, and not the meander line by which it is surveyed, is the boundary the fractional subdivisions. To determine whether a bar or island is part of the land on either side of a stream, account must be taken in every case of a variety of circumstances, such as the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel.

"It is a question of fact to be determined from all the surrounding circumstances, whether the land between the meander line and the shore of the lake or watercourse is included in the survey. (See Lammers v. Nissen, 4 Neb. 251, and Granger v. Swart, 1 Woodworth's C. C. Rep. 90). In this case we conclude from the facts proved and found by the court that the island in question was not included in the land surveyed on the south side of the south channel.

"It is unnecessary to decide the question incidentally discussed by counsel as to whether the Truckee is a navigable stream within the meaning of the laws regulating the public surveys."

The case of Steinbuchel v. Lane (Kan.) 51 Pac. 886, is also directly in point. In that case, also, the island was small as compared with the one in the present case. It contained only about 26 acres, and the river channel separating it from the mainland was also much smaller. In that case the court said:

"There can be no question as to the soundness of the rule that the government of the United States cannot deprive a riparian proprietor of any sub-

stantial right that passed to him under a patent to the bank of a stream, whether navigable or not. In this case, however, the question is, what was the boundary of the land patented to Smith? Was it the north bank of the river, the center line of the north channel, the center line of the south channel, or, as seems to be claimed by the plaintiffs in error, a line running midway between the north and south banks, dividing the island into two parts, making the thread of the stream extend across dry land, and over primitive soil. * * *In this case the channel on the north was as much the Arkansas river as that on the south of the island. There was a well-defined stream on either side. The island was not a mere shifting sand bar or temporary accretion. It was primitive soil, on which large trees were standing. The survey of lot 5 was along the bank of the river, as though it were a navigable stream. The island, which would have fallen in four different sections if surveyed as though the stream were not navigable, was not included in the number of acres patented to Smith. He paid for 129.67 acres, and it is not claimed that it is necessary to include the island in order to make up this quantity of land. The island is in no sense an accretion to his property, nor was it ever so situated with reference to it as to render it an appurtenance necessary to the enjoyment of his rights as a riparian proprietor.

"It is impossible to lay down a definite rule which will determine every case involving a question as to what passes by grant of land bordering on a water course. Whether islands are intended to be reserved or to pass must be determined from their situation and extent, and the action of the land department. The Government is not bound to make all its surveys at one time. It may convey public lands by such boundaries and designations as it deems most practicable. We do not think the facts of this case disclose the intent to convey the island, or any part of it, to Smith; but that the acts of the land department, all taken together, must be construed

to amount to a reservation of the land until it passed to Mary Norman, under whom the defendant claims. As having some bearing on the matters involved in this case, see Wiggenhorn v. Kountz, 23 Neb. 690, 37 N. W. 603; West v. Paper Co. 82 Wis. 647, 52 N. W. 803; Benson v. Morrow, 61 Mo. 345. We do not think the conclusion here reached conflicts with either the case of Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, or Lamprey v. Metcalf (Minn.) 53 N. W. 1139. We think at most, the plaintiff's boundary extends only to the middle thread of the north channel of the river."

The doctrine controlling the above cases, is fundamental, and it is not new to the law of this country. Mr. Justice Miller, while a member of this Court, in his charge to the jury in Granger v. Swart, Fed. Cases No. 5,685, applied the same doctrine to that case. He there said:

"The first and principal question to be determined by the jury is, whether these patents cover the land in controversy. The patents and deeds under which the defendant claims, do not pass title to the premises in question, unless, at the date of the entries on which they issued, the Rock River, where it is called a river, and Lake Koshkonong, where it is called a lake, extended to and bordered upon the meander line which constitutes the boundary of the lands described in the patents. In other words, if, between the meander line which by the Government survey was made one of the boundaries of the land sold to Walker, and the bank of Rock River and shore of Lake Koshkonong, there was at that time a body of swamp, or waste land, or flats, on which timber and grass grew, and horses and cattle could feed, and hay be cut, then the patents to Walker did not cover this land but were confined to the actual limit of said meander line.

"On the other hand, if, when the entries were made, the bank of the river and shore of the lake, at an ordinary stage of water, were where this meandered line was represented by the United States Survey, and the land in controversy has since been formed

by receding of the water, or by accretion to the shore and bank, then it became the land of the defendant, or of Walker, as the title might be in one or the other.

"If the first of these positions be found by you to be true, the defendant has no title to the land; if the second be true, he has title to the addition made by the accretion."

Whether a meander line does in fact define the sinuosity of the bank of a stream may be determind by evidence *aliunde*, and it is elementary law that the meander line does not estop the Government from disposing of lands left unsurveyed beyond that line.

Bissel v. Fletcher, 19 Neb. 725, 28 N. W. 303.
Lammers v. Nissen, 4 Neb. 245.

The question may again be asked, when and to whom did the title to Poole Island pass from the Federal Government? And through what source and in what manner did defendants in error acquire title to that island? Defendants can not by any process of correct reasoning connect themselves with the title, which must at one time have been vested in the Federal Government.

A few cases may be found involving insignificant sandbars or mere rocky points or "made" land, where the Courts have arbitrarily applied the maxim of *de minimis non curat lex*, but it is obvious that the case at bar cannot be disposed of on that maxim.

The decision of the Idaho Supreme Court can not be sustained by any system of sound reasoning based on the correct application of fundamental legal principles to the facts presented by the record.

Wherefore, we respectfully submit that the judgment entered in favor of defendants in error should be set aside. and the cause remanded with instructions to dismiss.

Respectfully submitted,

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Residence, Boise, Idaho.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 86.

JOHN E. SCOTT, Plaintiff in Error,

vs.

CHARLES P. LATTIG, Designated as C. P. LATTIG, and ROBERT GREEN.

BRIEF OF DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Idaho.

STATEMENT.

This action was instituted by the defendant in error Lattig to determine the ownership of an island (known as "Pool Island") lying in Snake River, in Canyon County, Idaho. Lattig claimed to own all of the island by virtue of his ownership of the upland in fractional section 15 and by reason of adverse possession (Record, pages 3, 4); the defendant in error Green claimed to own that portion of the island which lies opposite to or in front of the fractional north half of section 22 as an incident to his ownership of the latter (Record, pages 6, 7); and the plaintiff

in error Scott based his right to the island on the grounds, first, that it was part of the unsurveyed public domain of the United States and that he had squatted upon and occupied it as such; second, that thereafter, on September 27th, 1905 (the day on which he filed and served his answer) (Record, page 5), he had complied with the requirements of sections 4552-4556 of the Revised Codes of Idaho, relating to possessory titles to real estate; and, third, that it was his intention to enter and claim the island as a homestead under the public land laws of the United States as soon as the same was surveyed and subject to entry (Record, pages 4, 5). Later, on June 6th, 1907, Scott filed a supplemental answer, in which he averred that since filing his answer the island had been surveyed by request of the Commissioner of the General Land Office; that the plat of the survey of said island would be filed in the Land Office at Boise on July 8th, 1907, and that it was his intention to enter the same as a homestead at that time in virtue of his preference right (Record, pages 9, 10). Upon the issues so presented and from the evidence adduced at the trial, the Court found that Lattig was the owner of that part of the island which lies in front of the upland belonging to him; that Green was the owner of that portion of the island which lies opposite the upland of which he is the patentee, and that Scott was not the owner of the island or entitled to its possession, or any part thereof. The default of the other parties named in the complaint as defendants was entered for failure to appear and answer (Record, pages 12-17). The upland above described was surveyed by order of the Commissioner of the General Land Office in September, 1868 (Record, page 50). Prior to the year 1894, Samuel

W. Pool entered lots numbered 2, 3 and 4 in fractional section 15, under the public land laws of the United States, and duly received a patent therefor. He paid the government for 73.30 acres (Record, page 52). Lattig is the successor in interest by mesne conveyances of Pool (Record, page 52). Some time prior to 1895, Green entered the fractional north half of section 22 as a homestead and received a patent therefor on February 4th, 1895. He paid the government for 98.75 acres (Record, pages 52, 65). Each of the patents aforesaid recited, without any reservation or restriction of terms, that the description was "according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor-General" (Record, page 52). A copy of that portion of the original plat of township 9 north, range 5 west, in which said fractional sections 15 and 22 are situated, is set out in the opinion of the Court (17 Ida. 511), and appears in the Transcript at page 50, folio 86. The field notes to fractional sections 10, 15 and 22 accompanying said map show that, in surveying the north boundary of said fractonal section 22, the surveyor "Set a post with charred stake in mound of earth, with pits as per instructions for cor. to frac. secs. 15 and 22 on the right bank of Snake River" (Record, page 50). And that in surveying the lines between fractional sections 10 and 15, he "Set post with charred stake in mound of earth with pits as per instructions for cor. to frac. secs. 10 and 15 on the right bank of Snake River" (Record, page 50). And that in surveying the east boundary of said fractional section 10, he "Set post with charred stake in mound of earth with pits as per instructions for cor. to frac. secs. 10 and 11, on right bank of Snake River" (Record, page 50). And that

in surveying the line between fractional sections 21 and 22, he "Set post with charred stake in mound of earth with pits as per instructions for cor. to frac. secs. 21 and 22 on right bank of Snake River" (Record, page 51). Then follow the notes of the meanders of the *right bank of Snake River* for fractional sections 10, 15 and 22 (Record, page 51). In the "general description" of the township, it is said, among other things: "This township contains a *fair* proportion of rich bottom land situated on the Snake and Payette Rivers" (Record, page 51).

The defendants in error and the predecessors in interest of Lattig were in the exclusive possession of the island until about the year 1904 (Record, page 64). The government never pretended to assert any claim to the island in question until 1906, and then only upon the application of Scott, who had squatted on the land (Record, page 64). In the year 1903 or in 1904, Scott "entered upon this island as the employe of one of the owners of the upland" (Record, page 52). Thereafter, he applied to the General Land Office to have the island surveyed and on or about the month of June, 1906, a survey was made and field notes and a plat returned by the surveyor (Record, page 52). The order directing a survey of Pool Island recites that it is located in "Snake River, situated in sections 15 and 22, T. 9 N., R. 5 W., Idaho" (Record, page 64). The field notes and plat of the surveyor show that the island is 8600 feet long and contains 138.15 acres, of which 54.75 acres were decreed to Lattig and 83.40 acres to Green. (Record, pages 54, 56, 65). Its average width is apparently about 700 feet (Record, page 56). Opposite the land of Lattig it is less than 700 feet wide while in front of the land of Green it varies from 500 to over 1200 feet (Record,

page 56). The whole island, with the possible exception of a couple of acres at its upper or southern end, is included within said fractional sections 15 and 22 (Record, page 64). At the point where the island is situated the thread of the main channel of Snake River forms the boundary line between the States of Idaho and Oregon (Record, page 57). The survey of 1906 further shows that the main channel of the river is of an average width of 1000 feet (Record, page 57). On the east side the channel varies in width from 240 feet near the lower end to 385 feet at the upper end (Record, page 57). The river has a fall of six feet from the upper end to the lower end of the island (Record, page 57). The evidence does not show when the island was formed or that it was in existence in 1868 (Record, page 63), the date of the original survey.

Points and Authorities.

In substance, the following statute has been the law of this jurisdiction since 1864:

> "The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these Revised Codes, is the rule of decision in all the courts of this State."
>
> Sec. 18, Revised Codes of Idaho.

The decision in the present case is based upon the common law doctrine of riparian ownership in subaqueous land.

Lattig vs. Scott, 17 Ida. 506; 107 Pac. 47

Our Supreme Court first gave effect to this doctrine in the case of Johnson vs. Johnson, 14 Ida. 561; 95 Pac. 490; 24 L. R. A. (N. S.), 1240.

The latter case was followed in that of Moss vs. Ramey,

14 Idaho, 598; 95 Pac. 513; Fischer vs. Davis, 19 Ida. 493; 116 Pac. 412, and in Ulbright vs. Baalington, 20 Ida. 539; 119 Pac. 292; also in Donovan-Hopka-Ninneman Co. vs. Hope Lumber Mfg. Co., 194 Fed. 643.

It is now definitely settled that at common law "the owners of the banks *prima facie* own the beds of all fresh water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream, *usque ad filum aquae.*"

Shively vs. Bowlby, 152 U. S. 1; 38 L. Ed. 331, 343; 14 Sup. Ct. Rep. 549.

Hardin vs. Jordan, 140 U. S. 371; 35 L. Ed. 428; 11 Sup. Ct. Rep. 808.

Kinkead vs. Turgeon, 74 Neb. 580; 1 L. R. A. (N. S.), 762; 7 L. R. A. (N. S.), 316; 121 Am. St. Rep. 740; 104 N. W. 1061; 109 N. W. 744.

Farnum on "Waters," pp. 104-118.

Lattig vs. Scott, *supra.*

Johnson vs. Johnson, *supra,* and case note, 24 L. R. A. (N. S.), 1240.

Goff vs. Cougle, 118 Mich. 307; 76 N. W. 489; 42 L. R. A. 161, and subject note thereto.

"The rights of a riparian owner upon a navigable stream in this country are governed by the laws of the State in which the stream is situated."

Weems Steamboat Co. vs. People's Steamboat Co. 214 U. S. Rep. 345; 53 L. Ed. 1024; 29 Sup. Ct. Rep. 661.

McGilvra vs. Ross, 215 U. S. 70; 54 L. Ed. 95; 30 Sup. Ct. Rep. 27.

Kansas vs. Colorado, 206 U. S. 46; 51 L. Ed. 956; 27 Sup. Ct. Rep. 655.

State of Iowa vs. Carr, 191 Fed. 257.

"This was established in Pollard vs. Hagan, 3 How. 212; 11 L. Ed. 565, a case involving the question of title to certain lands in Mobile, Alabama, which had originally been below high water mark, but had been reclaimed and improved. * * * Pollard vs. Hagan was approved in Shively vs. Bowlby, *supra*, and has been repeatedly affirmed since and become settled law."

Weil on "Water Rights," Vol. 1 (3rd Ed.), Sec. 898 note 11.

A grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof. The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the State, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like Illinois C. R. Co. vs. Illinois, 146 U. S. 387; 36 L. Ed. 1018; 13 Sup. Ct. Rep. 110. The fact that the river is a boundary between different States has not been held to make a difference.

United States vs. Chandler-Dunbar Water Co. 209 U. S. 447; 52 L. Ed. 881; 28 Sup. Ct. Rep. 579.

Johnson vs. Johnson, *supra*.

Lattig vs. Scott, *supra*.

Grants by the United States of public lands bounded on streams, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the land lies.

Grand Rapids & I. R. Co. vs. Butler, 159 U. S. 87; 40 L. Ed. 85; 15 Sup. Ct. Rep. 991.

Hardin vs. Jordan, *supra*.

Packer vs. Bird, 137 U. S. 661; 34 L. Ed. 819; 11 Sup. Ct. Rep. 210.

Johnson vs. Johnson, *supra.*

Lattig vs. Scott, *supra.*

Unsurveyed islands between the bank and the thread of the main channel of the river not omitted from survey by fraud or mistake pass with the mainland to the riparian patentee.

Johnson vs. Johnson, *supra.*

Moss vs. Ramey, *supra.*

Lattig vs. Scott, *supra.*

United States vs. Chandler-Dunbar Water Power Co. *supra.*

Whitaker vs. McBride, 197 U. S. 510; 25 Sup. Ct. Rep. 530; 49 L. Ed. 857.

Grand Rapids & I. R. Co. vs. Butler, *supra.*

St. Paul & P. R. Co. vs. Schurmeier, 7 Wall. 272; 19 L. Ed. 74.

United States vs. Stinson, 197 U. S. 200; 25 Sup. Ct. Rep. 426; 49 L. Ed. 724.

Mitchell vs. Smale, 140 U. S. 406; 11 Sup. Ct. Rep. 819; 35 L. Ed. 442.

Hardin vs. Jordan, *supra.*

The cases passing on the question of the ownership of islands in a navigable stream, when not necessarily dependent upon the question of whether the adjoining owner takes to the thread of the stream or merely to the shore, are collated in a subject note to Holman vs. Hodges, 58 L. R. A. 673, and in a case note to Webber vs. Axtell, 6 L. R. A. (N. S.), 194.

It cannot be pretended that private ownership of the bed of the stream or of the island, subject to the public rights, will impair the interest of the public in the waters of Snake River.

United States vs. Chandler-Dunbar Water Power Co., *supra.*

Johnson vs. Johnson, *supra.*

Lattig vs. Scott, *supra.*

Snake River is a navigable river and as such is a public highway and subject to the use of the public, not only to low water mark, but to high water mark, and the riparian owner can in no way interfere with this use.

Johnson vs. Johnson, *supra.*

Except in cases of omission by accident, fraud or mistake, the United States has no authority to make surveys subsequent to patent of any land between the meander line and the thread of the main channel.

St. Paul & P. R. Co. vs. Schurmeier, 7 Wall. 272, 289; 19 L. Ed. 74.

Hardin vs. Jordan, 140 U. S. 371, 383; 35 L. Ed. 428, 433; 11 Sup. Ct. Rep. 808, 838.

Mitchell vs. Smale, 140 U. S. 406, 412, 413; 35 L. Ed. 442, 444, 445; 11 Sup. Ct. Rep. 819, 840.

Moore vs. Robbins, 96 U. S. 530, 533; 24 L. Ed. 848, 850.

Davis vs. Wiebbold, 139 U. S. 507; 35 L. Ed. 238; 11 Sup. Ct. Rep. 628.

Grand Rapids & I. R. Co. vs. Butler, 159 U. S. 87; 40 L. Ed. 85; 15 Sup. Ct. Rep. 991.

St. Louis Smelting & Ref. Co. vs. Kemp, 104 U. S. 636, 646; 26 L. Ed. 875, 878.

Lindsey vs. Hawes, 2 Black, 554, 560, 561; 17 L. Ed. 265, 268.

Cragin vs. Powell, 128 U. S. 691; 32 L. Ed. 566; 9 Sup. Ct. Rep. 203.

Webber vs. Pere Marquette Boom Co. 62 Mich. 635; 30 N. W. 469.

Shufeldt vs. Spaulding, 37 Wis. 662.

State vs. Lake St. Clair Fishing & Shooting Club, 127 Mich. 587; 87 N. W. 117.

In cases of this kind, it is well settled that the meander line is not the boundary.

Johnson vs. Hurst, 10 Ida. 308; 77 Pac. 784.

Johnson vs. Johnson, *supra.*

Lattig vs. Scott, *supra.*

St. Paul & P. R. Co. vs. Schurmeier, 7 Wall. 272; 19 L. Ed. 74.

Ordinarily, the government is bound by its own plats, and a patent issued referring to the official plats amounts to an adoption of such plats as a part of the description, and the natural monuments therein designated and shown are ordinarily controlling as to the boundary line.

Lattig vs. Scott, *supra.*

Jefferis vs. East Omaha Land Co. 134 U. S. 178; 33 L. Ed. 872; 10 Sup. Ct. Rep. 518.

At common law islands formed in a fresh water river, if altogether on one side of the dividing line, the *filum aquae*, belong to him who owns the bank on that side.

Ingraham vs. Wilkinson, 4 Pick. 268; 16 Am. Dec. 342.

Branham vs. Turnpike Co. 1 Lea, 704; 27 Am. R. 789.

Parties purchasing property shown by the United States surveys and plats to be riparian property should not be excluded from the water front.

St. Paul & P. R. Co. vs. Schurmeier, *supra.*

Bartlett Land & Lumber Co. vs. Saunders, 103 U. S. 316, 319; 26 L. Ed. 546, 548.

Bates vs. Illinois C. R. Co. *supra.*

Lindsey vs. Hawes, 2 Black, 554; 17 L. Ed. 265.

St. Clair vs. Lovingston, 23 Wall. 46, 63; 23 L. Ed. 59, 62.

Brown vs. Huger, 21 How. 305; 16 L. Ed. 125.

Hardin vs. Jordan, *supra.*

Mitchell vs. Smale, 140 U. S. 406, 412-414; 35 L. Ed. 442, 444, 445; 11 Sup. Ct. Rep. 819, 840.

Jefferis vs. East Omaha Land Co. 134 U. S. 178, 195 196, 197; 33 L. Ed. 872, 878, 879; 10 Sup. Ct. Rep. 518.

Cragin vs. Powell, *supra.*

Boorman vs. Sunnuchs, 42 Wis. 233.

Wright vs. Day, 33 Wis. 264.

Watson vs. Peters, 26 Mich. 517.

Richardson vs. Prentiss, 48 Mich. 91; 11 N. W. 819.

Grand Rapids Ice & Coal Co. vs. South Grand Rapids Ice & Coal Co. 102 Mich. 236; 25 L. R. A. 815; 47 Am. St. Rep. 516; 60 N. W. 681.

Where lands are bounded by streams, and monuments on the banks are stated to be corners, the true corner is held to be the point in the middle thread of the stream opposite the given monument.

Luce vs. Carley, 24 Wend. 453; 35 Am. Dec. 637.

Seneca Nation vs. Knight, 23 N. Y. 498.

St. Clair vs. Lovingston, 23 Wall. 46, 63-65; 23 L. Ed. 59, 62, 63.

Cold Spring Iron Works vs. Tolland, 9 Cush. 495.

Newton vs. Eddy, 23 Vt. 319.

McCullock vs. Aten, 2 Ohio, 307.

Handly vs. Anthony, 5 Wheat. 375, 380; 5 L. Ed. 113, 114.

Buck vs. Squires, 22 Vt. 494.

ARGUMENT.

The theory upon which the decision in this case is predicated can best be stated in the language of the opinion itself, written by Mr. Justice Ailshie:

> "The only question to be determined in this case is this: Did the United States convey this island to its grantees, Poole and Green, by the patents issued to them in 1894 and 1895? In answering this question there are some well-recognized rules it will be necessary to observe. It has been repeatedly held by the Supreme Court of the United States and is now the settled law of the land that the 'grants by the United States of its public land bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies.' (Grand Rapids & Ind. R. Co. vs. Butler, 159 U. S. 87; 15 Sup. Ct. 991; 40 L. Ed. 85; Hardin vs. Jordan, 140 U. S. 371; 11 Sup. Ct. 808, 838; 35 L. Ed. 428; Middleton vs. Pritchard, 4 Ill. 510; 38 Am. Dec. 112.) This rule was adopted and quoted with approval in Whitaker vs. McBride, 197 U. S. 510; 25 Sup. Ct. 530; 49 L. Ed. 857, to the same effect. As said by the Court in St. Louis vs. Rutz, 138 U. S. 226; 11 Sup. Ct. 337; 34 L. Ed. 941: 'The question as to whether the fee * * * extends to the middle thread of the stream or only to the water's edge is a question in regard to a rule of property which is governed by the

local law. * * * ' (Kaukauna Water Power Co. vs. Green Bay & Miss. Canal Co. 142 U. S. 254; 12 Sup. Ct. 173; 35 L. Ed. 1010.)

"In view of this well-established rule of law, we must construe these grants from the government, and their effect with reference to the boundary line along this stream, in the light of the decisions and rule of law in this state. After a very careful and full consideration of the question as to the rights of a riparian proprietor in this State, this Court held in Johnson vs. Johnson, 14 Ida. 561; 95 Pac. 499, as follows: 'A riparian owner upon the streams of this State, both navigable and non-navigable, takes to the thread of the stream, subject, however, to an easement for the use of the public.'

"It is also equally well settled that a meander line, run in conformity to the United States statute in surveying public lands bordering on a navigable stream, is not a line of boundary, but is intended only to designate and point out the sinuosity of the bank of the stream and as a means of ascertaining the quantity of land in the fractional subdivisions to be paid for by the purchaser, and that the real and true monument in such case is the watercourse and not the meander line." (Citing cases.) "Under the decisions of this Court in Johnson vs. Hurst, and Johnson vs. Johnson, *supra*, and numerous decisions from the Supreme Court of the United States, as well as the courts of the various States, there could be no doubt, we think, but that it would be our duty to hold that the land comprising this island belongs to the abutting upland owners if in fact no body of water intervened between the meander line and this tract of land. As said by the Supreme Court in Whitaker vs. McBride, a case in which the Court awarded an island of twenty-two acres to the riparian proprietor, 'If there were no islands in this case, it would not under these authorities be questioned that the title of the riparian owners extended to the center of the channel How far does the fact that there is this unsurveyed Island in the river abridge the scope of the rule?' * * *

"We are at once confronted with two lines of au-

thorities from the Supreme Court of the United States. On the one hand are Horne vs. Smith, 159 U. S. 40; 15 Sup. Ct. 988; 40 L. Ed. 68; Niles vs. Cedar Point Club, 175 U. S. 300; 20 Sup. Ct. 124; 44 L. Ed. 171; French-Glenn Livestock Co. vs. Springer, 185 U. S. 47; 22 Sup. Ct. 563; 46 L. Ed. 800; Security Land & E. Co. vs. Burns, 193 U. S. 167; 24 Sup. Ct. 425; 48 L. Ed. 662, and a number of State decisions to the same effect. We can most accurately state the holding of the first three of those cases by quoting from a summary made by Mr. Justice Brewer in Whitaker vs. McBride, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857. In referring to the foregoing case he said:

"'In the first of those cases it appeared that the survey stopped at a bayou, and did not extend to the main channel of the Indian river, a mile distant; and we held that the line of that bayou must be considered as the boundary of the grant; that it could not be extended over the unsurveyed land between the bayou and the main channel of the Indian river; that it was a case of an omission from the survey of land that ought to have been surveyed, and that such omission did not operate to transfer unsurveyed land to the patentee of the surveyed land bordering on the bayou. In the second, we held that, as the survey showed a meander line bordering on a tract of swamp or marsh lands, the grant by patent terminated at the meander line, and did not carry the swamp lands lying between it and the shores of Lake Erie. In the third, it appeared that there was no body of water in front of the meandered line, and we held that that line must, therefore, be the limit of the grant, and the fact that outside the side lines extended there was a body of water did not operate to extend the grant into any portion of that body of water.'

"The other cases are similar in facts and principle to those just reviewed.

"On the other hand, there is a line of more numerous decisions from the same Court holding that when the government has surveyed its lands along the bank of a river and has sold and conveyed the uplands by government patent and by legal subdivisions, the patent conveys the title to all the land lying between such meander line and the high-water mark or

low water-mark or thread of the stream, as the rule may prevail in the state where the lands are situated, and that if in a state where the riparian proprietor takes to the thread of the stream, he takes all such islands as lie on his side of the middle of the stream." (Citing authorities).

"The question, therefore, confronting us is to discover, if possible, the distinguishing feature or circumstance between these two lines of authority, and ascertain the class to which the present case belongs."

(Here the opinion refers to and quotes from the decisions of this Court.)

"Ordinarily, the government is bound by its own plats, and a patent issued referring to the official plats amounts to an adoption of such plats as a part of the description and the natural monuments therein designated and shown are ordinarily controlling as to the boundary line." (Here the opinion refers to and quotes from Grand Rapids & Ind. R. Co. vs. Butler, 159 U. S. 88; 15 Sup. Ct. 991; 40 L. Ed. 85).

"In further considering the questions involved in the foregoing case, the Chief Justice quoted with approval from the opinion of the Court in Middleton vs. Pritchard, 4 Ill. 510, 38 Am. Dec. 112, as follows:

* * * * * * * * *

(After quoting from said decision, the opinion proceeds).

"Middleton vs. Pritchard has been so repeatedly cited and quoted from with approval by the highest court of the land that we feel justified in accepting it as sound law."

(Here follow references to and quotations from the decisions of this Court.)

"It will be at once observed that the first line of authorities above cited consists chiefly of marsh, bayou, slough and lake cases. On the contrary, the distinctly river cases, from states holding to the common-law rule as to the vesting of title in the riparian proprietor to the thread of the stream, almost, if not entirely without exception, hold that the grantee

from the government takes not only any margin of land between the meander line and the water but also such unsurveyed islands as lie on his side of the middle of the stream."

* * * * * * * * *

"Now, as we gather from the rulings and comments of the Court running throughout the different cases on both sides of this question, we arrive at the conclusion that the Court will only permit the government to intervene and survey land lying between the meander line and the river, or other body of water, in cases where the survey has been made prior to the sale or disposal of the fractional subdivisions or abutting land by the government, or in cases where the body of land is so large and so situated that no other reasonable inference can be drawn than that it was not the purpose and intention of the surveyor to survey the entire tract or of the government to part with title to the entire tract, and that the physical conditions and surrounding facts are so clear and patent that the purchaser could not help but know that he was not purchasing so large a body of land when buying a small fractional subdivision adjoining the unsurveyed tract. This seems to be also true in cases of palpable fraud on the part of the surveyor. It is only where the physical facts and circumstances rebut the legal presumption that the government intended to part with title to the land in question, that the Court will recognize a further conveyance. In the light of these conclusions and of the foregoing authorities, we may well recount some of the undisputed facts of this case and natural inferences deducible therefrom."

The foregoing excerpt discloses very clearly the reasons which prompted the Court in arriving at the conclusion it did.

Our Position.

The opinion in this case and the decisions of this Court render it unnecessary for us to make any extended argu-

ment. We rely upon principles of law firmly established by the decisions of this Court and quoted and enforced by the decision in this case. Briefly, these principles, and the law and the facts on which we rely, are: 1. The question as to whether the fee of the defendants in error, as riparian proprietors on the Snake River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Idaho. Or, in other words: 2. Grants by the United States of lands bounded on Snake River in Idaho are to be construed as to their effect according to the law of Idaho, unless the grants contain words of reservation or restriction. 3. The decisions of the Supreme Court of Idaho declare the local law to be that the owners of lands bordering on Snake River own to the center of the main channel, including islands on their side of the channel which have not been reserved by the government. 4. If there were no island in this case, it would not, under the local law and the decisions of this Court, be questioned that the title of the defendants in error extends to the center of the main channel. How far does the fact that there is an island in the river abridge the scope of the rule? 5. Unsurveyed islands at the date of patent not omitted from survey by mistake or fraud do not abridge the scope of the rule but pass with the mainland to the riparian patentee.

The foregoing formula narrows our inquiry to whether the failure to survey the island prior to 1906 was due to fraud or mistake. With respect to this question, the plaintiff in error has the affirmative and the burden of proof. Upon his counsel rests the duty of uncovering the fraud or pointing out the mistake which shall take this

case out of the general rule. Upon us, of successfully resisting their attempt to avoid the presumption that the island passed with the upland and the bed of the stream. Being under the necessity of preparing our brief before receiving a copy of theirs, we are somewhat in the dark as to how counsel will treat the question and as to the order in which they will discuss it. However, we suspect that the arrangement of their argument will not differ materially from that adopted by them below. Heretofore, counsel have contended that the situation and extent of the island and the action of the Land Department show conclusively that the island was omitted from the original survey by reason of fraud or mistake.

Size, Situation and Extent of the Island.

The size of the island is believed by counsel to establish beyond peradventure that its omission from the original survey was either a palpable fraud or an obvious mistake. It seems to us that this is a very dangerous and illogical test. To our minds, the only just and proper standard to apply is the value and contour of the island at the date the government patents issued to defendants in error. The Court will take judicial notice of the fact that at the time of the original survey the particular country in question was a desert drear, of unappreciated potential value. In the year 1868, jack rabbits, sage brush, coyotes and alkali were its chief attractions. The only land of recognized value at that time was the land referred to by the surveyor in his notes: "This township contains a fair proportion of rich bottom land situated on the Snake and Payette Rivers." The bottom land thus referred to was sufficiently low and so situated that it was sub-irrigated by the Snake

and Payette Rivers. During the high water season the island was sub-irrigated and as a result produced rose bushes, willows and wild grass, but without artificial irrigation (an impracticable if not an impossible thing at the time) there was no known use to which it could be put that would promise a return on the expense of improving the same. As an incident to the upland, it had a value as grazing land, but as it dried out during the low water season, which began early in July, it had no value for any other purpose. The island was a narrow strip of otherwise utterly worthless land, over a mile and a half in length, in the midst of millions of acres of upland that the government was attempting to dispose of. No doubt the officials having charge of the survey in question observed the length and narrowness of the island and were aware that a riparian owner could claim only so much of the island as lay directly in front of his upland. If so, is it strange that they concluded that a riparian patentee would not receive by virtue of his patent, in the way of additional land, anything for which he should pay? Doubtless, under all the circumstances, the officials considered the island of no practical value whatever. There is nothing in the fact that the island contained 138.15 acres of land in 1906 that indicates fraud or mistake in failing to survey the island in 1868. As said by the Supreme Court of Idaho, in Johnson vs. Johnson, *supra*, this Court, in the case of Mitchell vs. Smale, *supra*, "sustained the title of a riparian owner to 25 acres between the meander line and the water line, when the patent called for only a fractional one-quarter section containing 4.53 acres," and "in the case of Sherwin vs. Butzer, 97 Minn. 252; 106 N. W. 1046, the Supreme

Court of that State sustained the title of a riparian owner to 143.93 acres between the meander line and the lake in a different section, where his patent called for 68.6 acres." This fully justifies the observation above quoted from the opinion in this case, namely, that "Under the decisions of the Supreme Court of Idaho and numerous decisions from the Supreme Court of the United States, as well as the courts of the various States, there could be no doubt, we think, but that it would be our duty to hold that the land comprising this island belongs to the abutting upland owners if, in fact, no body of water intervened between the meander line and this tract of land."

The size of the island will be repeatedly urged in this Court as a sufficient reason for reversing the judgment in this case. Therefore, we must continue to press upon the consideration of the Court the length and breadth of the island and the question of its value. The relative size of islands, irrespective of their contour or value, does not affect the principle involved. If we understand the decision in Mission Rock Co. vs. United States, 48 C. C. A. 641; 109 Fed. 763, it is there held that size is not the criterion. After a comparison of the two rocks or islands in question with the Island of Alcatraz, the Court says: "The relative size, however, of the rocks or islands does not change their legal character." If this were not the law, what would hinder the government from arbitrarily surveying and selling the land lying between the meander line and high water mark? There are many strips of unsurveyed upland lying along Snake River equal in length and breadth to Pool Island. In the present case, for instance, the meander line is from 100 to 600 feet from the water line. The plaintiff in error magnanimously bestows

this strip upon defendants in error as though he possessed some power in the premises. However, the fact that plaintiff in error will be content with the island and has waived any claim to the upland is no guaranty whatever that some other "prowling squatter" will not attempt to grab it. If the judgment in this case shall be reversed, this will indubitably happen if the strip is ever deemed of sufficient value to justify a suit. If the Court will sanction the action of the Land Department in granting Scott's application for a survey of Pool Island, then there is nothing in the law to prevent the Department from exercising a like bureaucratic power with respect to the surplus upland claimed by our clients. The right of a riparian owner on Snake River to claim to the water line in virtue of his patent is no more firmly established by the decisions of this Court than is the right of such riparian owner to claim to the middle of the main channel by the help of the local law. If the size of the island is sufficient to create an exception to the rule that the riparian proprietor owns the bed of the stream, to the thread thereof, it follows that the size of the upland between the meander line and the water's edge is sufficient to create an exception to the rule that the patent conveyed title to high water mark. Obviously, it is impossible to distinguish the former from the latter upon principle. Our only protection, then, is the fact that the upland in question has neither present nor prospective value. Thus, we see that value is the controlling consideration as a matter of fact, if not as matter of law.

The value which the island has today independent of the upland is due to the fact that in recent years gasoline and electricity have become available motives for pumping

plants, a possibility never contemplated in 1868. We insist that if account is taken of all the circumstances existing at the date of the original survey, there is absolutely nothing from which fraud or mistake can be imputed to anyone.

Land in Dispute Is Admittedly an Island.

Also stress was laid upon the fact that the land in question is truly an island; that is, a body of land entirely surrounded by water throughout the year. Is this a controlling consideration? We think not. In Whitaker vs. McBride and in Grand Rapids & I. R. Co. vs. Butler, the lands involved were islands proper, yet they were held to belong to the riparian owners; hence we conclude that fraud or mistake may not be predicated upon the mere fact that the slough between the upland and the island continues to flow during the whole rather than a portion of the year.

Island Not Subject to Overflow.

The fact that the island is not subject to inundation was urged by counsel as a feature in their favor. We reply that this fact has no probative value with respect to any issue in this case. It was conceded that the land in dispute is not subaqueous in character and the fact of non-inundation does not tend to prove anything not thus admitted. Where in can it be claimed that such fact tends to prove fraud or mistake in omitting to survey the island?

Was Island in Existence at Date of Original Survey?

What we have said thus far is in answer to the assumption of plaintiff in error that the island was in existence at

the time of the original survey. At this point we again call attention to the opinion in this case:

> "Neither is there any showing that the island in fact existed at the time the survey of 1868 was made. Under the rules of evidence recognized by this and all other courts so far as we are advised, it must be accepted as an established fact in this case that Poole Island did not exist at the time of the survey of 1868. The plat and field-notes show all the land to have been surveyed and that all the intervening surface was covered by the waters of Snake River. This plat and the field-notes were made by the direction of the government, the owner of the land, and were approved by the government and constitute prima facie evidence of the matters and facts therein designated and recited. That being true, a prima facie case has been made to the effect that no island existed at the time of the survey in 1868. It may, in fact, have been there, and yet not have been at that time the size that the government required surveyed; or it may have been nothing more than a strip of sand or gravel-bar extending along the course of the river and considered of no importance or value. It might have easily formed in a few years, as it is only slightly more than a mile below the mouth of the Payette River which empties into the Snake on the Idaho side. What was said by Mr. Justice Brewer in Whitaker vs. McBride, in speaking of some islands in the Platte River, is very applicable in this case. He said: 'Possibly they have been regarded as having no stability as tracts of land, but as like sand-bars which are frequently found in western waters and are of temporary duration, existing today and gone tomorrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyor.'"

The failure to prove that the island was in existence at the time of the original survey was, of course, a failure of proof on the issue as to whether the officials having charge thereof were guilty of fraud or mistake in omitting to survey the island.

What Was the Effect of the Survey of 1906?

Counsel on the other side have urged with seeming confidence that the action of the Land Department in directing a survey of the island in 1906 is decisive of this case in that it establishes beyond question that the failure to survey the island in 1868 was due to fraud or mistake. To our minds neither the reasons advanced to support such a conclusion nor the conclusion itself is sound. *The question of title must be determined as of the date of the patents issued to Pool and Green.* Whatever property and property rights the government then and thereby conveyed vested in the patentees and their successors in interest forever. Vested rights can be divested only by due process of law. The extent of the riparian rights thus acquired is to be determined by applying the law then in force in the light of the facts, circumstances and conditions then and theretofore existing. Did the riparian patentees take title to the thread of the main channel originally? That is the question. It is the action of the Land Department in omitting the island from the original survey, in not surveying the island prior to issuing its patents to the upland, and in failing to reserve the island in its patents that is material, and not its subsequent action in directing a survey thereof taken at the behest of Scott. The effect of the patents cannot be abridged or fraud or mistake established by introducing into the case the subsequent action of the government in directing a survey of the island for the same reason that the subsequent acts and declarations of an ordinary grantor are incompetent to impeach or defeat his deed. Unless fraud or mistake is established independently and as of the date of or prior to the patents, the fact that the government laid claim to the island subsequently is of no consequence whatever.

We believe we have run the gamut of arguments advanced by counsel in support of their contention that the failure to survey the island was due to fraud or mistake. Wherein, we ask, does the record give even plausible support to that contention? We urge that there is absolutely no evidence on which the plaintiff in error may rely, unless the omission itself be held to constitute fraud or mistake. No effort was made to show that the Land Department or any of its agents or employes had returned false field notes or a false plat, or that the omission was for the purpose of permitting the riparian patentees to acquire the island. Some such evidence as this was essential to prove a fraud. Neither was an attempt made to prove that there was any error in the plat or field notes, or that the island was in some way concealed so that its existence was unknown to the government surveyor. Some such evidence as this was essential to establish a mistake.

So far as we are advised, it was not the policy of the government to survey the islands in the Snake River until very recently. The following excerpt from the opinion in this case shows that the Court believed that none of the islands had been surveyed originally:

> "In view of the fact that Snake River flows through Idaho and constitutes the boundary line between the State of Idaho and the States of Oregon and Washington on the west for a sweep of some 600 miles, and that within that distance there is a large number of islands of varying sizes on the Idaho side of the thread of the stream, this question must necessarily recur from time to time, and it is essential that the rule of law be established with reference to the title to those islands."

The fact that none of the islands of Snake River were surveyed originally negatives the idea that the island in

question was omitted by accident, fraud or mistake. We will conclude this branch of our argument with a few apt quotations from the decisions of this Court.

In Mitchell vs. Smale, *supra*, it is said:

> "We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government.
>
> * * * * * * * * *
>
> "In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey in 1834-35."

In Hardin vs. Jordan, *supra*, it is said:

> "There should be some extraordinary proof of mistake on the part of the surveyor in order to interefere with the passing of the land as riparian land."

In Whitaker vs. McBride, *supra*, it is said:

> "Possibly they have been regarded as having no stability as tracts of land, but as like sand bars which are frequently found in western waters and are of temporary duration, existing today and gone tomorrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyor."

In Grand Rapids & I. R. Co. vs. Butler, *supra*, it is said:

> "We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory; and did not survey the so-called Island No. 5 until twenty-five

years after the survey of 1831, and nearly twenty years after that of 1837."

Jurisdiction of Land Department.

Is not the discussion of the jurisdiction of the Land Department a plain evasion of the question at issue? With respect to the jurisdiction of the Land Department and the courts to determine like controversies, we quote from 32 Cyc., at page 1008:

> "The Land Department of the United States is a quasi judicial tribunal invested with authority to hear and determine claims to the public lands, subject to its disposition, and to determine all questions of fact that may arise in any controversy respecting the right of any person to receive a patent for any of the public lands, and to execute its judgments by issuing patents to the parties entitled to them; but after the legal title to public land has passed from the government, the Land Department has no jurisdiction to determine controversies between individual claimants concerning the title or right to the possession thereof."
>
> See Iron Silver Mining Co. vs. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed.
>
> Lightner Mining Co. vs. Superior Court (Cal.), 112 Pac. 909, 911.

The question at issue is whether the legal title to the island passed from the government prior to the survey of 1906. Our contention is that the Land Department exhausted its jurisdiction by issuing patents which, with the help of the local law, conveyed the bed of Snake River to the middle of the main channel, including the island. When it had jurisdiction, it refrained from exercising it either by causing the island to be surveyed or by reserving it in terms in the patents which it issued to Pool and Green.

Island Was Formed Before Statehood.

It is argued that the island is not the property of the riparian owners because it was in existence prior to the admission of Idaho as a State. In support of this alleged criterion, Farnum on Waters, page 50, is quoted and the cases of Mission Rock Co. vs. U. S., Shiveley vs. Bowlby, Illinois C. R. Co. vs. Illinois, and Martin vs Waddell, 16 Pet. 367, 10 L. Ed. 997, are cited. No principle of law is discussed by Mr. Farnum and no decision is cited by him which supports the text. In a foot note the learned author cites Widdicomb vs. Rosemiller, 118 Fed. 295, but as we read that case it does not support the contention of counsel. On page 2501 of his excellent work, Mr. Farnum says:

> "In any country in which the title to the land has recently been in the government, and has been granted by it to private individuals, the question becomes an important one as to whether or not the islands in the stream are to be regarded as part of the upland so as to pass by a grant of it without express mention, or whether the title to them is retained by the government to be conferred upon another grantee. * * * Whether islands are intended to be reserved, or to pass, must be determined from their situation and extent and the action of the land department. There are certain general rules, however, which will decide most cases which may arise. If the policy of the government is to part with the title to the bed of the stream, the island will be presumed to have been regarded as part of the bed, and to have passed by a grant of the upland, unless it was expressly reserved, or there was plain implication that it was not intended to pass."

We are constrained to believe that in announcing the rule just quoted, the learned author was speaking with reference to islands formed both before and after the ad-

mission of a State into the Union. We claim that the opinion in this case is fully supported and sustained by this admirable treatise and admitted authority on the subject of waters. Of the cases cited by counsel above referred to, that of Mission Rock Co. vs. U. S. is the only one in which the title to an island was involved, and that case is pertinently disposed of in the opinion of the Court in this case with the observation:

> "It is contended, however, by the appellant that this island already existed at the time of the admission of the State into the Union, and that the test should be applied as of that date.
>
> "It does not seem to us that such an inquiry becomes an important question here. Under the rule of law prevailing in this State, the State does not take title to this island. United States vs. Mission Rock Co. * * * cited by appellant, was a tide land case between the government and the grantee of the State and involved the application of a different principle from that arising in the case at bar."

We are not aware that this Court has ever applied the test contended for by plaintiff in error in determining the ownership of an island situated in a fresh water stream. Indeed, in the case of United States vs. Chandler-Dunbar Water Power Co.,*supra,* which is the latest expression of this Court on the subject, such a criterion is not even suggested. This is particularly significant because the rocky character of the islands involved in that case indubitably showed that they were in existence before Michigan became a State.

The Dissenting Opinion.

The difficulty of finding any logical ground on which to base a claim that in cases of this character islands do not

pass to the riparian patentees is aptly illustrated by the dissenting opinion of Mr. Justice Sullivan. In Johnson vs. Johnson, *supra*, he dissents upon the ground that grants of the government to settlers along navigable streams extend only to high water mark and that the title to the beds of navigable rivers of this State and to the islands therein is in the State of Idaho. He further held the public safety required that the title to subaqueous land and to islands in navigable rivers should remain in the State.

Counsel for plaintiff in error can hardly be expected to indorse that doctrine here, for in United States vs. Chandler-Dunbar Water Power Company, *supra*, it is said:

> "But it cannot be pretended that private ownership of the bed of the stream or of the island, subject to the public rights, will impair the interest of the public in the waters of the Sault Ste. Marie."

In the present case, the learned justice, after casually referring to his dissenting opinion in the former case in this manner:

> "My views of some of the questions involved are quite fully set forth in my dissenting opinion in the case of Johnson vs. Johnson, 14 Ida. 561; 95 Pac. 499,"

adds that he dissents also for the reasons that the island was in existence before Idaho became a State and did not pass to the riparian patentees, but was the property of the United States.

Thus we see that Mr. Justice Sullivan's view of "sound principles of public policy" has been expressly repudiated by a decision of this Court and that his contention that the islands in Snake River on the Idaho side of the thread of the stream belonged to the State has been repudiated by himself.

Conclusion.

It has been our constant endeavor throughout our argument to present a rationale of the decisions of this Court dealing with the question at issue. This was a difficult undertaking, for the reasons stated in Farnum on Waters, at page 246. He says:

> "This question of the title of the beds and shores of navigable waters is one of purely local law, upon which the Supreme Court of the United States is bound by the State decisions, unless, in attempting to deprive the riparian owner of his rights, the Supreme Court of the United States is not called upon to express an opinion with reference to the policy or expediency of placing the title in the public or in the riparian owner, yet it has frequently done so. When a case has reached it from a State in which the policy was to place the title in the riparian owner, that Court has written an opinion in support of that policy; if the next case happened to come from a State where the opposite policy obtained, an opinion in support of such opposite policy was delivered."

If our effort in this behalf has been successful, we believe we have shown our right to prevail. We are confident that the decisions of this Court fully sustain the position we take and the opinion in this case. We again urge that the pregnant inquiry of Mr. Justice Brewer in Whitaker vs. McBride, *supra*, is the crux of the controversy. After observing that according to local law the title of the riparian owners extended to the middle of the main channel, he asked: How far does the fact that there is this unsurveyed island in the river abridge the scope of the rule? It is the fact that we cannot be deprived of the island without being also deprived of the benefit of this rule which this Court must consider. It is safe to predict that the Snake River will, like Tennyson's brook, flow on

and on forever. But no man can say where the river will flow in the future—whether to the west or east of the island, or in its present channels. All we can know is that rivers do change their beds and that the Snake River is no exception to the rule. We also know that a large portion of the water in the river is now being diverted and used above the island for the irrigation of arid lands and that during the low water season the amount of water in the river at the point in question is considerably depleted as a result thereof (Record, page 27). It is important to remember, too, that during low water season is precisely the time when riparian rights are the most valuable. If it shall be held that the title of the defendants in error extends only to the thread of the east channel, it is possible, aye, probable, that through a change in the course of the river their riparian rights may be lost entirely. In this connection, the following words of Mr. Justice Bradley, in Mitchell vs. Smale, are peculiarly applicable:

> "We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant."

Finally, we commend to the serious consideration of the Court the closing words of the opinion in this case:

> "The lands abutting on this stream have been acquired by pioneer settlers and homesteaders in good faith and they have, as a general rule, taken possession of and occupied these islands and gravel and sand bars, and put them to such use as they could make of them, and if at this late date the government

is from time to time to order those islands surveyed and issue patents upon the application of 'prowling squatters' (Murphy vs. Kirwan, 103 Fed. 109; Lamprey vs. State, 5 Minn. 197; 38 Am. St. 541; 53 N. W. 1142; 18 L. R. A. 677), the situation will become lamentable and exceedingly prejudicial and burdensome to settlers and bona fide home-builders. We can not give our sanction to such a proceedure."

Respectfully submitted,

KARL PAINE,

IRA W. KENWARD,

Residence Boise, Idaho, and Payette, Idaho, Respectively.

Solicitors for Defendants in Error.

SCOTT v. LATTIG.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 86. Argued December 13, 1912.—Decided February 3, 1913.

An error in omitting an island in a navigable stream does not divest the United States of the title or interpose any obstacle to surveying it at a later time.

Purchasers of fractional interests of subdivisions on the bank of a navigable stream do not acquire title to an island on the other side of the channel merely because the island was omitted from the survey.

Lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty, subject to the paramount power of Congress to control navigation between the States and with foreign powers.

Each new State, upon its admission to the Union, becomes endowed with the same rights and powers in regard to sovereignty over lands under navigable waters as the older States.

An island within the public domain in a navigable stream and actually in existence at the time of the survey of the banks of the stream, and also in existence when the State within which it was situated is admitted to the Union, remains property of the United States, and even though omitted from the survey it does not become part of the fractional subdivisions on the opposite bank of the stream; and so *held* as to an island in Snake River, Idaho. *United States* v. *Mission Rock Co.*, 189 U. S. 391, followed; *Whitaker* v. *McBride*, 197 U. S. 510, distinguished.

17 Idaho, 506, reversed.

THE facts, which involve the title to an island in a navigable river and whether it remained public land after the survey, are stated in the opinion.

Mr. Oliver O. Haga, with whom *Mr. James H. Richards* and *Mr. McKeen F. Morrow* were on the brief, for plaintiff in error:

Public grants convey nothing by implication; they are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants. Nothing passes by a public grant but that which is necessarily or expressly embraced in its terms. *United States* v. *Arredondo*, 6 Pet. 691; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546; *Shively* v. *Bowlby*, 152 U. S. 1; *Martin* v. *Waddell*, 16 Pet. 367, 411; *Central Trans. Co.* v. *Pullman Pal. Car Co.*, 139 U. S. 24, 49.

Whenever the question in any court, state or Federal, is whether the title to land which has once been the property of the United States has passed from the Federal Government, that question must be resolved by the laws of the United States. *Wilcox* v. *Jackson*, 13 Pet. 498, 517; *Irvine* v. *Marshall*, 20 How. 558; *Gibson* v. *Chouteau*, 13 Wall. 92.

Congress alone has, under Art. IV, § 3 of the Constitution, the power to determine the manner of disposing of the public lands, and it has the sole power to declare the dignity and effect of titles emanating from the United States. *United States* v. *Gratiot*, 14 Pet. 526; *Bagnell* v. *Broderick*, 13 Pet. 436; *Downes* v. *Bidwell*, 182 U. S. 268; *Kean* v. *Calumet Canal & Imp. Co.*, 190 U. S. 466.

The United States holds the title to the beds, below high water mark, of the navigable streams within a Territory for the benefit of the whole people, and in trust for the State or States to be ultimately created out of such Territory. *Shively* v. *Bowlby*, 152 U. S. 1, 28; *Weber* v. *State Harbor Comrs.*, 18 Wall. 57; *Packer* v. *Bird*, 137 U. S. 661; *Knight* v. *United Land Ass'n*, 142 U. S. 161; *San Francisco* v. *Le Roy*, 138 U. S. 656; *McGilvra* v. *Ross*, 215 U. S. 70.

In the United States the law does not distinguish be-

tween tidal streams and non-tidal streams which are navigable in fact. *McGilvra* v. *Ross*, 215 U. S. 70; *Barney* v. *Keokuk*, 94 U. S. 324; *The Genessee Chief* v. *Fitzhugh*, 12 How. 443; *Shively* v. *Bowlby*, 152 U. S. 1.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force title to the upland only, or what lies above ordinary high water mark. And such grants do not impair the title and dominion of the future State, when created, to the bed of the stream below ordinary high water mark. *Shively* v. *Bowlby*, 152 U. S. 1; *McGilvra* v. *Ross*, 215 U. S. 70; *Eldridge* v. *Tresevant*, 160 U. S. 452, 467.

The use of the shores of navigable streams and the right, title or interest of riparian proprietors, or the owners of the upland, to such shores and to the beds of the streams must be determined by the laws of the several States, subject only to the rights vested by the Constitution in the United States. *Shively* v. *Bowlby, supra; St. Anthony Falls Co.* v. *St. Paul*, 168 U. S. 349, 361; *St. Clair County* v. *Lovingston*, 23 Wall. 46, 68; *Barney* v. *Keokuk*, 94 U. S. 338; *Ill. Cent. R. Co.* v. *Chicago*, 176 U. S. 646, 660; *Pollard* v. *Kibbe*, 9 How. 471; *Packer* v. *Bird*, 137 U. S. 671; *Scranton* v. *Wheeler*, 179 U. S. 141, 187; *Mobile Trans. Co.* v. *Mobile*, 187 U. S. 479; *Pollard* v. *Hagan*, 3 How. 212.

The courts of the United States will construe the grants of the general Government without reference to the rules of construction adopted by the States for their grants, but whatever incidents or rights to the soil under navigable waters, or below high water mark, attach to the ownership of the upland conveyed by the Government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use or enjoyment of the property by the grantee. *Shively* v. *Bowlby; St. Anthony &c. Co.* v. *St. Paul*, and *McGilvra* v. *Ross, supra.*

Snake River in southern Idaho is a navigable stream. *Johnson* v. *Johnson*, 14 Idaho, 561; *Moss* v. *Ramey*, 14 Idaho, 598.

Whether a riparian owner holds title in fee to the center of a navigable stream, or to low water mark or high water mark must be determined by the laws of the State in which the upland is situated. *McGilvra* v. *Ross* and *Shively* v. *Bowlby*, *supra*.

The title to the bed and shores of non-navigable streams is vested in the owner of the upland, and where the opposite banks of a stream, not navigable, belong to different persons the stream and the bed thereof is common to both. Rev. Stat., U. S., § 2476.

The owner in fee of the bed of the river, or other submerged land, is the owner of any bar, island or dry land which may be subsequently formed thereon. *St. Louis* v. *Rutz*, 138 U. S. 226.

Islands formed in the stream before the admission of the State into the Union are subject to disposal by the Federal Government the same as other public lands. If they are formed after the admission of the State, the question whether they belong to the riparian owner, or are the property of the State, is governed by local law. 1 Farnum on Waters, p. 50; *United States* v. *Mission Rock Co.*, 189 U. S. 391; *Mission Rock* v. *United States*, 109 Fed. Rep. 763; *Steinbuchel* v. *Lane* (Kan.) 51 Pac. Rep. 886; *Shoemaker* v. *Hatch*, 13 Nevada, 261; *Granger* v. *Swart*, Fed. Cas. No. 5685.

Public agents cannot bind the Government beyond the terms of the statute under which they act. The Government is not bound. *Moffat* v. *United States*, 112 U. S. 34; *Kirwan* v. *Murphy*, 189 U. S. 35; *Horne* v. *Smith*, 159 U. S. 40.

The failure of a public land surveyor to survey an island of 138.15 acres of high and valuable agricultural land, not subject to inundation or overflow, does not enlarge the

title conveyed by the patents to the upland situated across a 400 foot channel from the island. *Horne* v. *Smith*, 159 U. S. 40; *Niles* v. *Cedar Point Club*, 175 U. S. 300; *Barnhart* v. *Ehrhart*, 33 Oregon, 274; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47; *Security Land Co.* v. *Burns*, 193 U. S. 167; *Steinbuchel* v. *Lane* (Kan.) 51 Pac. Rep. 886; *Shoemaker* v. *Hatch*, 13 Nevada, 261; *Whiteside* v. *United States*, 93 U. S. 247; *In re Peterson*, 39 Land Dec. 566.

One receiving a patent for the full acreage of upland paid for will not be heard to insist that, by reason of the failure of the surveyor to note on the official plat the existence of an island of 138.15 acres of agricultural land, not subject to overflow, and situated across a 400 foot channel from the upland, he is entitled to the island also. Cases *supra* and *Lammers* v. *Nissen*, 4 Nebraska, 245; *Bissel* v. *Fletcher*, 19 Nebraska, 725; *Harrison* v. *Stipes*, 34 Nebraska, 431.

An island in existence at the time of the admission of the State into the Union, consisting of 138.15 acres of dry land not subject to overflow and adapted to ordinary agricultural uses, is not part of the river bed, and title thereto does not pass by implication or legal intendment to either the State or the riparian owner, but it may be claimed, surveyed and sold by the Government as other public lands. See *Re Peterson; Steinbuchel* v. *Lane* and *Shoemaker* v. *Hatch*, *supra*.

The Government as the original proprietor has the right to survey and sell any lands, including islands in the rivers or other bodies of water; and the failure of the surveyor to show an island on the official plat does not estop the Government from claiming it when its attention is directed to it. Cases *supra*.

Whether an island is open to homestead entry and settlement, and should therefore be surveyed, is a matter within executive judgment or discretion. *Carrick* v. *Lamar*, 116

U. S. 423; *St. Louis* v. *Rutz*, 138 U. S. 251; *Kirwan* v. *Murphy*, 189 U. S. 35, 56.

The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands; and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else. *Lee* v. *Johnson*, 116 U. S. 48; *Marquez* v. *Frisbie*, 101 U. S. 473; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636; *Moore* v. *Robbins*, 96 U. S. 530; *Baldwin* v. *Starks*, 107 U. S. 463; *United States* v. *Minor*, 114 U. S. 233; *Burfenning* v. *Chicago, St. P., M. & O. R. Co.*, 163 U. S. 321; *Johnson* v. *Drew*, 171 U. S. 93; *Moss* v. *Dowman*, 176 U. S. 413; *Gertgens* v. *O'Connor*, 191 U. S. 237.

The Land Department in issuing a patent must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 447; *Johnson* v. *Towsley*, 13 Wall. 72, 83; *French* v. *Fyan*, 93 U. S. 169, 172; *Quinby* v. *Conlan*, 104 U. S. 420, 426.

A decision rendered by the officers of the Land Department upon a question of fact is conclusive and not subject to be reviewed by the courts in the absence of a showing that such decision was rendered in consequence of fraud or imposition or mistake other than an error of judgment in estimating the value or effect of evidence, regardless of whether or not it was consistent with the preponderance of the evidence, so long as there is some evidence upon which the finding in question could be made. *Hartwell* v. *Havighorst*, 196 U. S. 635; *Jordan* v. *Smith*, 12 Oklahoma, 703; *Wiseman* v. *Eastman*, 21 Washington, 163; *Love* v. *Flahive*, 33 Montana, 348; *Parsons* v. *Venzke*, 4 Nor. Dak.

452; aff'd 164 U. S. 89; *Shepley* v. *Cowan*, 91 U. S. 330; 32 Cyc, 1020 *et seq.*; *Le Fevre* v. *Amonson*, 11 Idaho, 45; *White* v. *Whitcomb*, 13 Idaho, 490; aff'd 214 U. S. 15.

The decisions of the Land Department on the construction of the land laws are entitled to great respect at the hands of the court and should not be overruled unless they are clearly erroneous. *United States* v. *Healy*, 160 U. S. 136; *Robertson* v. *Downing*, 127 U. S. 607; *Hahn* v. *Cook*, 29 Nevada, 518; *Lavagnino* v. *Uhlig*, 26 Utah, 1; *O'Reilly* v. *Nixon* (Colo.), 113 Pac. Rep. 486.

The general rules as to the conclusiveness of decisions of the Land Department apply to decisions of the Commissioner of the General Land Office. *Rutledge* v. *Murphy*, 51 California, 388; *Shelton* v. *Keirn*, 45 Mississippi, 106; *Perry* v. *O'Hanlon*, 11 Missouri, 585; *Hartman* v. *Smith*, 7 Montana, 19; *Parsons* v. *Venzke*, 4 Nor. Dak. 452; aff'd 164 U. S. 89; *Glidden* v. *Union Pac. R. R. Co.*, 30 Fed. Rep. 660.

Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination. *De Cambra* v. *Rogers*, 189 U. S. 119.

When the Land Department accepted the application of plaintiff in error for a survey of the island in question and directed that said island be surveyed, platted and offered for sale as public land, it held in effect that it had not been the intention of the Government to surrender its title to said island under the patents to defendants in error, or their predecessors in interest, for the fractional lots situated across the channel from the island. And the decision of the Department on those questions has become *res adjudicata*, at least so far as the power of that Department extends. *In re Peterson*, 39 L. D. 566; *Case* v. *Church*, 17 L. D. 578; *Gowdy* v. *Gilbert*, 19 L. D. 17; *In re Palmer*, 26 L. D. 24; *In re Kuhlam*, 27 L. D. 68.

Mr. Karl Paine, with whom *Mr. Ira W. Kenward*, was on the brief, for defendants in error:

The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these revised codes, is the rule of decision in all the courts of Idaho. Section 18, Rev. Codes Idaho. This has been the law since 1864.

The decision in the present case is based upon the common-law doctrine of riparian ownership in subaqueous land. *Lattig* v. *Scott*, 17 Idaho, 506; following *Johnson* v. *Johnson*, 14 Idaho, 561; *Moss* v. *Ramey*, 14 Idaho, 598; *Fischer* v. *Davis*, 19 Idaho, 493; *Ulbright* v. *Baslington*, 20 Idaho, 539; *Donovan Co.* v. *Hope Lumber Co.*, 194 Fed. Rep. 643.

At common law "the owners of the banks prima facie own the beds of all fresh water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream, *usque ad filum aquæ*." *Shively* v. *Bowlby*, 152 U. S. 1; *Hardin* v. *Jordan*, 140 U. S. 371; *Kinkead* v. *Turgeon*, 74 Nebraska, 580; Farnum on Waters, pp. 104–118; *Johnson* v. *Johnson*, *supra*, and case note, 24 L. R. A. (N. S.) 1240; *Goff* v. *Cougle*, 118 Michigan, 307.

The rights of a riparian owner upon a navigable stream in this country are governed by the laws of the State in which the stream is situated. *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345; *McGilvra* v. *Ross*, 215 U. S. 70; *Kansas* v. *Colorado*, 206 U. S. 46; *Iowa* v. *Carr*, 191 Fed. Rep. 257; Weil on Water Rights, 3d ed., § 898, n. 11.

A grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof. The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the State, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary as in *Ill. Cent. R. Co.* v.

Illinois, 146 U. S. 387. The fact that the river is a boundary between different States makes no difference. *United States* v. *Chandler-Dunbar Water Co.*, 209 U. S. 447; *Johnson* v. *Johnson*, *supra*; *Lattig* v. *Scott*, *supra*.

Grants by the United States of public lands bounded on streams, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the land lies. *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87; *Hardin* v. *Jordan*, *supra*; *Packer* v. *Bird*, 137 U. S. 661; *Johnson* v. *Johnson*, and *Lattig* v. *Scott*, *supra*.

Unsurveyed islands between the bank and the thread of the main channel of the river not omitted from survey by fraud or mistake pass with the mainland to the riparian patentee. *Johnson* v. *Johnson*; *Moss* v. *Ramey*; *Lattig* v. *Scott*; *Hardin* v. *Jordan*; *Grand Rapids & I. R. Co.* v. *Butler*, and *United States* v. *Chandler-Dunbar Co.*, *supra*; *Whitaker* v. *McBride*, 197 U. S. 510; *St. Paul & P. R. Co.* v. *Schurmeier*, 7 Wall. 272; *United States* v. *Stinson*, 197 U. S. 200; *Mitchell* v. *Smale*, 140 U. S. 406.

For cases passing on the question of the ownership of islands in a navigable stream, when not necessarily dependent upon the question of whether the adjoining owner takes to the thread of the stream or merely to the shore, see *Holman* v. *Hodges*, 58 L. R. A. 673; *Webber* v. *Axtell*, 6 L. R. A. (N. S.), 194, note.

Private ownership of the bed of the stream or of the island, subject to the public rights, will not impair the interest of the public in the waters of Snake river. *United States* v. *Chandler-Dunbar Co.*; *Johnson* v. *Johnson*; *Lattig* v. *Scott*, *supra*.

Snake river is a navigable river and as such is a public highway and subject to the use of the public, not only to low-water mark, but to high-water mark, and the riparian owner can in no way interfere with this use. *Johnson* v. *Johnson*, *supra*.

Except in cases of omission by accident, fraud or mistake, the United States has no authority to make surveys subsequent to patent of any land between the meander line and the thread of the main channel. *St. Paul & P. R. Co.* v. *Schurmeier*, 7 Wall. 272, 289; *Hardin* v. *Jordan*, 140 U. S. 371, 383; *Mitchell* v. *Smale*, 140 U. S. 406, 412, 413; *Moore* v. *Robbins*, 96 U. S. 530, 533; *Davis* v. *Wiebold*, 139 U. S. 507; *Grand Rapids R. Co.* v. *Butler*, 159 U. S. 87; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 646; *Lindsey* v. *Hawes*, 2 Black, 554, 560; *Cragin* v. *Powell*, 128 U. S. 691; *Webber* v. *Pere Marquette Boom Co.*, 62 Michigan, 635; *Shufeldt* v. *Spaulding*, 37 Wisconsin, 662; *State* v. *Lake St. Clair Fishing Club*, 127 Michigan, 587.

In cases of this kind, the meander line is not the boundary. *Johnson* v. *Hurst*, 10 Idaho, 308; *St. Paul & P. R. Co.* v. *Schurmeier*, 7 Wall. 272.

Ordinarily, the Government is bound by its own plats, and a patent issued referring to the official plats amounts to an adoption of such plats as a part of the description, and the natural monuments therein designated and shown are ordinarily controlling as to the boundary line. *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178.

At common law islands formed in a fresh water river, if altogether on one side of the dividing line, the *filum aquæ*, belong to him who owns the bank on that side. *Ingraham* v. *Wilkinson*, 4 Pick. 268; *Branham* v. *Turnpike Co.*, 1 Lea, 704.

Parties purchasing property shown by the United States surveys and plats to be riparian property should not be excluded from the water front. Cases *supra*, and *Bartlett Land Co.* v. *Saunders*, 103 U. S. 316, 319; *Lindsey* v. *Hawes*, 2 Black, 554; *St. Clair* v. *Lovingston*, 23 Wall. 46, 63; *Brown* v. *Huger*, 21 How. 305; *Mitchell* v. *Smale*, 140 U. S. 406; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 195; *Boorman* v. *Sunnuchs*, 42 Wisconsin, 233; *Wright* v. *Day*, 33 Wisconsin, 264; *Watson* v. *Peters*, 26 Michigan,

517; *Richardson* v. *Prentiss*, 48 Michigan, 91; *Grand Rapids Ice Co.* v. *South Grand Rapids Ice Co.*, 102 Michigan, 236.

Where lands are bounded by streams, and monuments on the banks are stated to be corners, the true corner is held to be the point in the middle thread of the stream opposite the given monument. *Luce* v. *Carley*, 24 Wend. 453; *Seneca Nation* v. *Knight*, 23 N. Y. 498; *St. Clair* v. *Lovingston*, 23 Wall. 46, 63; *Cold Spring Iron Works* v. *Tolland*, 9 Cush. 495; *Newton* v. *Eddy*, 23 Vermont, 319; *McCullock* v. *Aten*, 2 Ohio, 307; *Handly* v. *Anthony*, 5 Wheat. 375, 380; *Buck* v. *Squires*, 22 Vermont, 494.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit in the District Court of Canyon County, Idaho, to quiet the title to Poole Island in the Snake river. The plaintiff, Lattig, claimed the northern part by reason of his ownership of lands on the east bank of the river and rested his claim to the southern part upon adverse possession. One of the defendants, Scott, claimed the entire island under the homestead law of the United States, and the other defendant, Green, claimed the southern part by reason of his ownership of lands on the east bank of the river, adjoining those of Lattig. Following a trial of the issues, a decree was entered sustaining Lattig's claim to the northern part and Green's to the southern, and quieting their titles against the claim of Scott. The Supreme Court of the State affirmed the decree, 17 Idaho, 506, and the case was then brought here.

The material facts are as follows: Snake river is a navigable stream and at the place in question is the boundary between the States of Oregon and Idaho. It flows northward past Poole Island in two channels, one on either side, and has a fall of 6 feet from one end of the island to the

other. The channel on the western or Oregon side is about 1,000 feet wide, and the one on the eastern or Idaho side is approximately 300 feet. The island is on the Idaho side of the thread of the stream, is over a mile in length, is from 500 to 1,200 feet in width, and has an area of 138.15 acres. It has well-defined banks extending from 3 to 5 feet above high water, is mostly covered with a growth of wild grass, sage brush and small timber, bears undoubted evidence of permanency and of having been there many years, and concededly was in the same condition as now in 1880, which was several years before Idaho was admitted into the Union and before the lands on the east bank of the river passed into private ownership. Those lands were surveyed in 1868, and the field notes and plat of the survey showed that the bank on that side of the river was meandered in the usual way and that the sections and subdivisions bordering thereon were fractional. The island was not mentioned in the field notes or plat. Lattig and Green severally own the fractional subdivisions on the east bank opposite the island under United States patents issued in 1894 and 1895, which describe them as containing 73.30 and 98.75 acres, respectively, "according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general." The northern part of the island, which is opposite the lands of Lattig, contains 54.75 acres, and the southern part, which is opposite the lands of Green, contains 83.40 acres. Scott settled upon the island, as unsurveyed public land, in the early part of 1904, with the purpose of acquiring the title under the homestead law of the United States (see act May 14, 1880, 21 Stat. 141, c. 89, § 3; Rev. Stat., § 2266), and has ever since resided on and occupied the island and improved and cultivated portions of it. In 1906 it was surveyed as public land by direction of the Commissioner of the General Land Office, and after this survey was approved and the plat

filed Scott tendered, in the regular way at the proper land office, an application to enter the island as a homestead in virtue of his prior settlement, and the application was duly accepted. It is said in the brief in his behalf that after the trial in the District Court his homestead claim was carried to completion and a patent was issued to him, but as this is not shown on the record it may be passed without other notice.

As it is manifest that the island, if in existence at the time of the survey in 1868, was then public land of the United States, and also that, if it continued to be public land in 1904, Scott initiated and acquired a valid claim to it under the homestead law, we will come at once to the reasons advanced for holding, as did the state court, that it ceased to be public land before 1904, viz., its omission from the survey of 1868, the admission of Idaho as a State in 1890, and the disposal of the lands on the east bank of the river in 1894 and 1895.

In making the survey of 1868 it was the duty of the surveyor, if the island was there at the time, to ascertain its exact location, to meander its exterior boundary, and to enter both in the field notes (Manual of Surveying Instructions of 1855, pp. 12–14; Act of May 30, 1862, 12 Stat. 409, c. 86), and therefore the absence of such an entry, as also of any representation of the island on the plat constructed from the field notes, naturally suggests that the island may not then have been in existence. But this suggestion is effectually refuted by the size, elevation and appearance of the island, the character and extent of the vegetation thereon, and the conceded fact that in 1880, only 12 years after the survey, it was in the same condition as now. That it was there at the time of the survey seems certain, although that is not so important as its existence when Idaho became a State. Of course, the error in omitting it from the survey did not divest the United States of the title or interpose any obstacle to sur-

veying it at a later time. Neither was the error calculated to induce purchasers of the fractional subdivisions on the east bank to believe that by paying for the 73.30 and 98.75 acres in those tracts they would get, respectively, 54.75 and 83.40 acres more on the island on the other side of the 300-foot channel. *Horne* v. *Smith*, 159 U. S. 40; *Niles* v. *Cedar Point Club*, 175 U. S. 300, 306.

Coming to the effect to be given to the admission of Idaho as a State and to the disposal of the fractional subdivisions on the east bank, it is well to repeat that Snake river is a navigable stream, for there is an important difference between navigable and non-navigable waters in such a connection. Thus, Rev. Stat., § 2476, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. 468, c. 29, § 9; March 3, 1803, 2 Stat. 229, c. 27, § 17), declares: "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both;" and of this provision it was said in *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 288, "the court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways." Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several States belong to the respective States in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights

of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68; *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, 434–437; *Shively* v. *Bowlby*, 152 U. S. 1, 48–50, 58; *McGilvra* v. *Ross*, 215 U. S. 70.

Bearing in mind, then, that Snake river is a navigable stream, it is apparent, first, that on the admission of Idaho to statehood the ownership of the bed of the river on the Idaho side of the thread of the stream—the thread being the true boundary of the State—passed from the United States to the State, subject to the limitations just indicated, and, second, that the subsequent disposal by the former of the fractional subdivisions on the east bank carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership. This is illustrated by the statement in *Hardin* v. *Shedd*, 190 U. S. 508, 519: "When land is conveyed by the United States bounded on a non-navigable lake belonging [illegible], the grounds for the decision must be quite different [illegible] the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. . . . When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore." *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 451, is to the same effect.

But the island, which we have seen was in existence when Idaho became a State, was not part of the bed of the stream or land under the water, and therefore its ownership did not pass to the State or come within the disposing influence of its laws. On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws, as did the island which was in controversy in *Mission Rock Co.* v. *United States*, 109 Fed. Rep. 763, 769-770, and *United States* v. *Mission Rock Co.*, 189 U. S. 391.

We think the cases relied upon by the defendants in error do not make for a contrary conclusion. *Railroad Company* v. *Schurmeir*, 7 Wall. 288, expressly recognizes "that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream." In *Grand Rapids & Indiana Railroad Co.* v. *Butler*, 159 U. S. 87, the evidence left it uncertain whether the so-called island was more than "a low sand bar, covered a good part of the year with water," at the time of the survey of the adjacent lands, which was in the year of the State's admission to the Union, and the court said (p. 95): "We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud." *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 451, is sufficiently distinguished by the following excerpt from the opinion: "The islands are little more than rocks rising very slightly above the level of the water, and contain respectively a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We cannot think that these provisions excepted such islands from the admitted transfer to the State of the bed of the streams surrounding them." And *Whitaker* v. *McBride*, 197 U. S. 510, which

related to a small island, in a non-navigable river, which the Land Department of the United States had expressly refused to survey, requires no other notice than to quote the following from the opinion (p. 515): "It must also be noticed that the Government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island or of the rights which would result in case it did make such survey. . . . Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are the owners of the bed of a stream to the center of the channel; that the Government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or preëmption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler."

For the reasons given the decree is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.